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SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GEORGE A. BINT,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety,

Defendants-Respondents.

EDWIN W. DALTON,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF

THE STATE OF IDAHO

Jurisdictional Statement

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Indemnity Fund

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Defendants-Respondents.	)
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EDWIN W. DALTON,	)
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Claimant-Appellant,	)
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I. QUESTIONS PRESENTED

1. Does the sixty (60) day exposure requirement for non-acute occupational diseases under Idaho Code §72-439 create unreasonable classifications which violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2. Does the sixty (60) day exposure requirement for occupational diseases under Idaho Code §72-439 violate the due process clause of the Fourteenth Amendment to the United States Constitution by establishing an irrebuttable presumption?

II. PARTIES

All the parties to this proceeding are listed in the caption of this case.

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III. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

At present, the decisions in this matter have not appeared in the official reports. The original opinion and the denial of rehearing do appear in the unofficial "Idaho Supreme Court Report" at 85 ISCR 99 (January 29, 1985), and 85 ISCR 765 (April 11, 1985). Copies of slip opinions are appended hereto as Exhibits A and C respectively.

IV. JURISDICTION

A. Nature of the Proceeding.

This matter involves two workmen's compensation claims under the occupational disease provisions of the Idaho Workmen's Compensation law. George Bint and Edwin Dalton were co-employees at the Defendant Creative Forest Products, and both asserted claims for occupational

lung disease. The claims were denied by the Employer and Sureties, and heard in separate proceedings before the Idaho Industrial Commission. In both cases, the Industrial Commission found that the employees suffered occupational lung disease which was caused by their employment at Creative Forest Products. It was also determined that the diseases were non-acute. Non-acute is not defined by statute; however, the Industrial Commission defined it as meaning a disease with a gradual as opposed to a sudden onset. Benefits were denied on the basis of Idaho Code §72-439, which requires exposure for sixty (60) days in cases involving non-acute disease. Bint had worked 59 calendar days, and Dalton had worked 51 calendar days. The Bint decision was rendered by the Industrial

Commission on August 1, 1983 (attached hereto as Exhibit D), and Claimant's Motion for Reconsideration was denied by the Industrial Commission on August 23, 1983 (attached hereto as Exhibit E). The Industrial Commission's Order in the Dalton case was filed January 26, 1984 (attached hereto as Exhibit F).

B. Decisions Appealed From.

Both cases were then appealed to the Idaho Supreme Court, and were consolidated on appeal. In both appeals, Bint and Dalton raised several issues, including whether Idaho Code §72-439 violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. In a split decision, 3 to 2, on January 29, [illegible], the Idaho Supreme Court affirmed the Orders of the Industrial Commission, and determined that Idaho

Code §72-439 did not violate State or Federal Constitutional provisions concerning equal protection and due process. Appellants' Petition for Rehearing was denied by the Idaho Supreme Court on April 11, 1985. Appellants have appealed from those decisions of the Idaho Supreme Court by filing a Notice of Appeal with the Idaho Supreme Court on May 3, 1985 (Exhibit G).

C. Provisions Conferring Jurisdiction.

Jurisdiction is conferred in this Appeal upon the United States Supreme Court by 28 U.S.C. 1257(2), which permits the United States Supreme Court to review by appeal the decision of a state supreme court,

> "where is drawn in question the validity of a statute of any state on the ground of its being

> repugnant to the constitution . . . of the United States, and the decision is in favor of its validity."

V. RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The relevant portion of Idaho Code §72-439 which is drawn in question in this appeal is as follows:

> An employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazards of such disease for a period of sixty (60) days for the same employer.

Idaho Code §72-201, outlines the policies supporting the workmen's compensation law in Idaho. That statute provides as follows:

> Declaration of police power - the common law system governing the remedy of workmen against employers for injuries received and occupational disease contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the

> state depends upon its industries and even more on the welfare of its wage workers. The State of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families' and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this law provided. (Emphasis added).

Appellants assert that Idaho Code §72-439 creates unreasonable classifications, and an irrebutable presumption. There is no reasonable basis for denying Bint and Dalton benefits simply because their disease happened to be non-acute (a very subjective term in itself), and because they were exposed for less than

sixty (60) days. There is no reasonable basis for distinguishing between acute and non-acute diseases in determining right to benefits. Occupational causation is the important factor, and that was established. The statute, in fact, would require Appellants to continue to expose themselves to dangerous conditions, just so they could meet the arbitrary time requirement for benefits. The statute denies sufferers of non-acute occupational disease who worked less than sixty (60) days any efficacy to their proof of causation. No reasonable justification exists for this exclusion from benefits, and I.C.§72-439 is, therefore, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person in its jurisdiction equal protection of the laws. (Emphasis added).

See E.g. Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed. 672 (1982); Turner v. Dept. of Employment Security, 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed 2d 181 (1975); Vlandis v. Kline, 412 U.S. 441, 93 Sup.Ct. 2230, 37 L.Ed.2d 63 (1973).

VI. STATEMENT OF THE CASE

A. George Bint

George Bint began working at Respondent Creative Forest Products (CFP) on January 6, 1982. He began work as a general laborer, and subsequently became a shaper operator and finally a shaper supervisor. He was continually exposed to red cedar dust. The last day that he worked was March 9, 1982. Bint worked on a total of 59 calendar days for the employer.

Bint first experienced abnormal symptoms on February 7 or 8, 1982. The complaints began with a sore raspy throat. He next developed chest pains and a cough. He lost his voice on three separate occasions. He coughed up phlegm and sawdust, and had a runny nose. On the 59th calendar work day, Bint's

supervisor suggested that he see Dr. Venning, which he did later the same day on March 9, 1982.

Dr. Venning advised the Claimant to cease work instantly. Dr. Venning's opinion was that Bint had an occupational pulmonary disease, and that Bint should definitely not go back to work around red cedar dust. Bint was also seen by Dr. Torrington, who agreed that Bint had an occupational pulmonary disease due to the red cedar dust. Dr. Torrington classified the disease as a non-acute disease, in that it had an insidious onset, i.e., that it developed over a period of time rather than having an immediately onset.

The employer and surety denied Bint workmen's compensation benefits based upon Idaho Code §72-439, due to the facts that Bint had a non-acute

occupational disease and had worked less than sixty (60) calendar days. A hearing was held before the Idaho Industrial Commission on the issue of whether Idaho Code §72-439 barred Claimant's right to benefits.

The Industrial Commission determined that although Bint had suffered an occupational disease as a result of his employment at Creative Forest Products, Idaho Code §72-439 did bar benefits, because the disease was non-acute, and Bint had not worked for sixty (60) days.

Bint argued before the Industrial Commission that Idaho Code §72-439 was violative of equal protection and due process clauses of the United States and Idaho Constitution. However, the Industrial Commission declined to rule on those issues, as it was an administrative

body. The matter was then appealed by Bint to the Idaho Supreme Court, and the constitutional issues again raised before that Court, which affirmed the denial of benefits.

B. Edwin Dalton

Edwin Dalton began working for CFP on December 7, 1981. Dalton operated machines in the production area. Dalton injured his finger on January 12, 1982, and was off of work for that injury until March 15, 1982. He then returned to work at CFP, and worked there through April 23, 1982. Dalton was regularly exposed to red cedar dust in the course of his employment. As a result of this exposure to red cedar dust, Claimant developed an allergy to red cedar dust, which led to asthma.

Dalton was treated by Dr. Torrington, and it was Dr. Torrington's opinion that the asthma was caused by Dalton's exposure to red cedar dust at the employment. Dalton did have a pre-existing chronic lung disease. However, Dr. Torrington was able to distinguish in his opinion the results of the cedar dust and the chronic lung exposure, and testified that as a result of the cedar dust allergy, Dalton had an additional 10% impairment of the whole person.

Torrington also testified that since the Claimant's allergy developed over a period of months, the disease process was non-acute. He did, however, testify that Dalton did have acute symptoms.

The Industrial Commission determined that Dalton did have an

occupational disease as a result of his exposure to red cedar dust at CFP. The Industrial Commission determined that the disease was non- acute, and that Dalton had not met the sixty (60) day exposure requirement for non-acute occupational diseases under Idaho Code §72-439. Dalton had worked on 51 calendar days. He reported for work on 11 other occasions, but did not work due to machine breakdowns.

Dalton raised the question of whether Idaho Code §72-439 violated the equal protection and due process clauses of the United States Constitution and the Idaho Constitution. However, the Industrial declined to rule on that issue. The matter was then appealed to the Idaho Supreme Court. The constitutional issues were raised; the Dalton and Bint cases

were consolidated; and benefits again denied.

VII. REASONS FOR PLENARY CONSIDERATION

Appellants believe that this is an appropriate case for plenary consideration and full hearing for several reasons. First, it is a relatively infrequent occurrence when a state statute is struck down on equal protection or due process grounds, particularly when based upon the rational basis test. Infrequent as such occurrences may be, however, Appellants believe that this particular case presents a prime example of legislation which establishes unreasonable and arbitrary classifications and irrebuttable presumptions. In appropriate cases, it is important that state legislatures be reminded that there are

constitutional restraints on their law making powers. In addition, state supreme courts in general need to be reminded occasionally that there are limits to their imaginations in conceiving purposes which constitutionally justify statutes. See E.g., Zobel v. Williams, 157 US 55, 102 S. Ct. 2309, 72 L.Ed.2d 672 (1982). In the present case, the Idaho Supreme Court made very little effort to come up with any rational basis to support the discriminatory treatment of workers suffering non-acute occupational diseases who worked less than 60 days. No legitimate reason was ever pointed out. Compared to the present case, the attempt by the Alaska Supreme Court in Zobel to outline supporting purposes for the legislation in question in that case

appears commendable (even though struck down). State Legislatures and state courts must be on notice that even seemingly small cases are subject to the United States Supreme Court's scrutiny.

Secondly, this type of statute is not an isolated one. The Colorado Supreme Court struck down a very similar statute on equal protection in the case of Stevenson v. Industrial Commission, 545 P.2d 712 (Colo. 1976). See also Kinney v. Kaiser Aluminum & Chemical Corp., 322 N.E.2d 880 (Ohio 1975) (Rule denying death benefits for death occurring three years after industrial injury created irrebuttable presumption because it denied right to prove causal connection). Thus, even in the narrow area of workmen's compensation, plenary

review of this case would have importance to other jurisdictions besides Idaho.

Finally, workmen's compensation is just one small part of the ever-growing area of social benefit legislation. Traditionally, government has been in the business of regulating conduct. However, in recent years, greater and greater emphasis has been placed on government provision of benefits. The present appeal is important because, in the context of general social benefit legislation, once government has decided to create a benefit program, it must observe certain fundamental principles in administering those benefits fairly and reasonably. As Zobel v. Williams, supra, clearly establishes, government distribution of benefits is subject to the constraints of the equal protection

and due process clauses. While the present case does not involve the direct distribution by the government of benefits, it does involve a government mandated distribution of benefits by private individuals, which is essentially the same proposition. Consequently, the present appeal offers the Court an opportunity to further define constitutional requirements involved in the fair distribution of legislatively mandated social benefits.

This case is not concerned with whether or not social benefits should, in fact, be legislated, but rather with the question of whether, once those benefits are in fact legislated, they can be denied to otherwise qualified recipients on the basis of unreasonable and arbitrary classifications or restrictions.

Consequently, this appeal can have impact on the general area of social benefit legislation.

DATED This 21 day of June 1985.

GOICOECHEA LAW OFFICE,
CHARTERED

By: Lynn M. Luker
Lynn M. Luker

CERTIFICATE OF SERVICE

STATE OF IDAHO)
: ss.
County of Ada)

I, LYNN M. LUKER, a member of the bar of the United States Supreme Court, hereby certify that a copy of the foregoing JURISDICTIONAL STATEMENT was served on the following people by depositing it in the United States Mail, with first class postage prepaid, on the 21 day of June, 1985:

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1985 Opinion No. 12.

IN THE SUPREME COURT OF
THE STATE OF IDAHO

NOS. 15192 and 19193

GEORGE A. BINT,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety,

Defendants-Respondents.

EDWIN W. DALTON,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants-Respondents.

BOISE, SEPTEMBER 1984 TERM
FILED: January 29, 1985
FREDERICK C. LYON CLERK

Appeals from the Industrial Commission of the State of Idaho.

§ 72-439 for failure to meet the 60-day exposure requirement for non-acute occupational disease contained therein.

Affirmed.

Lynn M. Luker, Esq., of Goicoechea Law Office, Chartered, Boise, Idaho, attorney for appellants Bint and Dalton.

John W. Barrett, Esq., and Michael Grover McPeek, Esq., of Moffatt, Thomas, Barrett & Blanton, Chartered, Boise, Idaho, attorneys for respondent Creative Forest Products.

Samuel Kaufman, Jr., Esq., of Anderson, Kaufman, Ringert & Clark; and Paul S. Penland, Esq. of Lojek & Penland, Boise, Idaho, attorneys for respondent Industrial Special Indemnity Fund.

DONALDSON, D.J.

Appellants, George Bint and Edwin Dalton, seek worker's compensation benefits from respondent, Creative Forest Products (CFP), for damages they suffered as a result of exposure to red cedar dust while they were employed at CFP. CFP manufactures patio furniture from cedar.

George Bint began working at CFP on January 6, 1982. Bint testified that on or about the 7th or 8th of February, 1982, he began having a sore throat, and within four to five days had a severe cough and chest pains. He began coughing up phlegm and sawdust and had a runny nose. Several times he lost his voice. CFP owner, Brian Sopatyk, told Bint he should see a doctor, and Bint testified that Soptyk set up an appointment with Doctor Venning for him on March 9. He

diagnosed Bint as suffering from an occupational illness caused by his exposure to the cedar dust at CFP. He advised Bint not to return to work. Bint did not return to work, and consequently, his last day at CFP was March 9, 1982. Bint was also examined by Doctor Torrington who characterized his occupational disease as "non-acute," in that it had an insidious onset rather than an acute onset.

The time sheets from CFP show that during the 63-day period from January 6, 1982, through March 9, 1982, Bint worked on 59 calendar days. Bint testified, however, that, he was on call 24 hours per day, and sometimes went in for short periods without punching in.

Additionally, the time sheets reflect that Bint on several occasions worked from 10 to 19 hours per shift.

Bint filed a claim for worker's compensation benefits. Respondents moved to dismiss pursuant to the 60-day exposure requirement of I.C. § 72-439. A hearing was held on this issue. The Commission found that Bint worked a total of 59 calendar days for the employer; that Bint did have an occupational disease; and that the occupational disease was non-acute. The Commission dismissed Bint's claim pursuant to I.C. § 72-439, for failure to meet the 60-day exposure requirement.

Edwin Dalton began working at CFP on December 7, 1981. He continued working until January 12, 1982, when he suffered

an injury to his finger. He was off work for approximately two months as a result of that injury. He returned to work on March 15, 1982, and worked through April 23, 1982. The time sheets from CFP indicate that Dalton worked a total of 48 shifts on 51 calendar days. On 11 occasions, Dalton reported for work but did not work due to machine breakdowns.

Prior to his employment at CFP, Dalton had chronic lung disease. As a result of his exposure to red cedar dust at CFP, Dalton developed an allergy which led to asthma. Due to his respiratory problems Dalton ceased work at CFP on April 23, 1982. He was advised by his doctor to stay away from red cedar dust.

Dalton filed a claim for worker's compensation benefits. The Industrial

Special Indemnity Fund was made a party to his action because Dalton alleged he was totally and permanently disabled as a result of a combined effect of his allergy to red cedar dust and his pre-existing impairment. Respondents move to dismiss pursuant to the 60-day exposure requirement of I.C. § 72-439. The Commission found that Dalton worked a total of 48 shifts at CFP; that he did have an occupational disease; that the disease was non-acute; and that as a result of his pre-existing lung disease and the occupational disease he has a permanent-partial impairment equal to 10% of the whole person. The Commission dismissed Dalton's claim for failure to meet the 60-day requirement of I.C. § 72-439.

Dalton's and Dint's claims were consolidated for purposes of this appeal.

Appellants present three issues on appeal: (1) Did the Industrial Commission err in its finding that claimants' occupational diseases were non-acute for purposes of applying I.C. § 72-439? (2) Did the Industrial Commission err in concluding that claimants had not met the 60-day exposure requirement? (3) Does the 60-day exposure requirement for non-acute diseases violate the fourteenth amendment to the United States Constitution, and article 1, Sections 2 and 31 of the Idaho Constitution? We will address each issue in turn.

Appellants first contend that the Commission erred in its finding that their diseases were non-acute. I.C. §72-439

provides that "[a]n employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer." The Idaho worker's compensation statutes do not provide a definition of the terms "acute" or "non-acute." The applicable dictionary definition of the term "acute" is "having a sudden onset, sharp rise, and short course." Webster's New Collegiate Dictionary 13 (1981 ed.). Similarly, the medical world defines an "acute" disease in terms of a short and sharp course: "Of short and sharp course, not chronic; said of a disease." Stedman's Medical Dictionary 20 (4th Lawyers ed. 1976).

The medical testimony in both cases indicates that appellants suffered from non-acute occupational diseases. Doctor Torrington was the medical expert who testified in both cases. He stated that, based on the medical literature, the majority of patients who develop red cedar induced asthma do so after a period of time, usually over a period of several months. For that reason, he testified that the disease was chronic rather than insidious. As to both appellants, he testified that because their symptoms developed gradually, over a period of several weeks or months, he would characterize their disease processes as non-acute.

Based on the above testimony, the Commission found, in both cases, that the

diseases were non-acute for purposes of applying I.C. § 72-439. The Commission's findings are supported by the evidence in both cases. Where contested findings of the Commission are supported by substantial, competent evidence, those findings will not be disturbed on appeal. I.C. § 72-732(1); In re Chavez, 104 Idaho 279, 658 P.2d 950 (1983); Bush v. Bonners Ferry School Dist. No. 101, 102 Idaho 620, 636 P.2d 175 (1981). Therefore, we hold that the Commission did not err in determining that, under I.C. § 72-43, appellants' diseases were non-acute.

Appellants next contend that the Commission erred in concluding that they had not met the 60-day exposure requirement. Like the word "non-acute", the word "day" is not defined in the worker's

compensation statutes. Appellants ask this Court to hold that "days of exposure" may refer to different time frames depending on the facts presented. Appellant Bint asserts that in his case we should define days of exposure as "equivalent work days." It is his position that a day of exposure refers to an 8-hour work day and that on those days where he worked in excess of eight hours, he should be credited with more than a single day of exposure. Appellant Dalton, on that other hand, urges that in his case a day of exposure should be interpreted as a calendar day. Dalton worked 48 shifts on 51 days and seeks credit for 51 rather than 48 days of exposure. We decline to adopt such an inconsistent position.

We note that the Industrial Commission did apply a different legal standard to determine the number of days of exposure in two hearings, albeit, not in the way the appellants wished. In Bint's case, the Commission determined that a day of exposure meant a calendar day of work, regardless of whether an employee worked more or less than eight hours. In Dalton's case, the Commission ruled that the number of days of exposure was to be determined by the number of shifts worked.

We believe that the legislature intended a day of exposure to refer to a calendar day of work. If the 60-day requirement were to be measured by an 8-hour work shift, problems would arise in determining how to count exposure time

on the days where an employee worked more than or less than eight hours. For example, where an employee worked less than eight hours on a given calendar day, would he be credited with one-half day of exposure, or a fractional portion of the day calculated by the ratio of his hours worked over the total hours? We do not believe that the legislature intended to create such a factual morass. The calendar day rule eliminates the procedural technicalities called for by the appellants' position. It also gives workers the benefit of the doubt in those cases where they have worked less than an eight-hour shift on a given day or where their shift started on one day and ended on another. Consequently, we hold that a

day of exposure, under I.C. §72-439, means a calendar day of work.

Additionally, appellants contend that a day of exposure should be interpreted broadly enough to include days on which appellants reported to work but did not actually work, and even days on which appellants did not report to work at all. (The last contention is based on the fact that appellants carried some cedar dust in their lungs throughout the entire period they were employed at CFP. Thus, appellants contend they continued to be exposed on those days when they did not work.) We decline to adopt such a broad interpretation of the exposure requirement.

In our view, a worker is exposed to the hazards of an occupational disease only on those days he works within the

hazardous environment. Thus, we hold that the 60-day exposure requirement under I.C. §72-439 means that an employee must have worked on 60 calendar days for the same employer before the employer is liable for worker's compensation. This view is consistent with our earlier decisions. Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977); See McLean v. Hecla Mining Co., 62 Idaho 75, 108 P.2d 299 (1941).

In McLean, supra, we held that although more than 60 days had elapsed between the date of hire and the date of discharge, the individual had worked only 45 days and, thus, was not entitled to compensation. Similarly, in Jones v. Morrison-Knudsen, supra, we held that I.C. §72-439 requires 60 days of exposure to the hazardous environment and directed

the Commission to count the number of exposures.

Appellants' final contention is that I.C. §72-439 is unconstitutional on both equal protection and due process grounds. Appellants first assert that the statute violates the equal protection clauses of the United States and Idaho Constitutions in that it establishes an unreasonable classification between workers with acute and workers with non-acute occupational diseases. Since I.C. §72-439 creates no suspect, "near" suspect, or invidiously discriminatory classification and since it does not involve a fundamental or "quasi" fundamental right, the proper standard for equal protection review of the "rational basis test." Heese v. A & T Trucking, 102 Idaho 598, 600,

635 P.2d 962, ____ (1981). See also LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977). Under the "rational basis test," a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it. State v. Bowman, 104 Idaho 39, 41, 655 P.2d 933, ____ (1982); School Dist. No. 25, Bannock County v. State Tax Commission, 101 Idaho 283, 288, 612 P.2d 126, 131 (1980).

Appellants assert that the distinction between acute and non-acute diseases is arbitrary and without a reasonable relationship to the purpose of the worker's compensation laws. The purpose of

worker's compensation is to provide compensation for "injuries received and occupational diseases contracted in industrial and public work . . . ." I.C. § 72-201 (emphasis added). Worker's compensation does not purport to be a social insurance program covering all a worker's health problems. The legislature has a legitimate interest in seeing that coverage for occupational diseases be kept within reasonable limits and in controlling the financial impact on Idaho industry and consumers. The legislature might have determined that these interests made it reasonable to establish a condition precedent of 60 days exposure before imposing liability for non-acute occupational diseases. The legislature might also have determined that it would

be unfair to impose corresponding time requirement on the employment relationship.

As we stated above, one of the principal distinctions between an acute and non-acute illness is the length of onset time. An acute illness is characterized by a sudden onset, while a non-acute illness develops more gradually, generally over a period of weeks or months. Given the time-related nature of non-acute illnesses, it seems reasonable for the legislature to impose a time requirement before the right to worker's compensation benefits accrues.

Historically, occupational disease coverage has lagged behind accidental injury coverage. There were various reasons for the lag. One reason was the

view that while accidental injuries were known to the common law, the concept of occupational disease was unknown. To the extent that worker's compensation was seen as substituting non-fault liability for injuries potentially subject to fault liability, there was thought to be no place for occupational diseases. Another reason was hesitation over whether a problem as generalized and extensive as occupational disease could be effectively dealt with under workmen's compensation. The final, and perhaps the most compelling, reason was the fear that the heavy incidence of occupational disease would place an unbearable burden on the compensation system. 1B A. Larson, Workmen's Compensation Law § 41.20 (1982).

Idaho adopted its first occupational disease statute in 1939, the Occupational Disease Compensation Law. 1939 Idaho Sess. Laws, ch. 161, at 286. This Court has previously recognized that the statute was a departure from the original Compensation Act, which did not provide compensation for occupational diseases, and has shown deference to the limitations promulgated by the legislature for administering the Act. In Habera v. Polaris Mining Co., 62 Idaho 54, 108 P.2d 297 (1940), we stated:

> "This statute is a departure from the original compensation law and is intended to include certain occupational diseases in the list of compensable accidents not theretofore covered. In attempting to do so, the legislature evidentally anticipated difficulty in the application and administration of such an act unless very definite bounds were fixed within which is might operate. It

> accordingly prescribed certain limitations and prohibitions . . . ." Id. at 56, 108 P.2d at ___.

The Act extended coverage to a specific list of occupational diseases. It also provided various limitations on coverage including the 60-day exposure requirement. The 60-day rule has remained a part of Idaho law ever since. It was re-enacted in its present form in 1971. 1971 Idaho Sess. Laws, Ch. 124, § 3, at 424. While we recognize that the 60-day exposure requirement may, in some cases, mandate harsh results, it is not our function to adjudge the wisdom of I.C. § 72-439. We are concerned only with its constitutionality: whether it is unreasonable, arbitrary, capricious or discriminatory. It will not be held to be so where it reflects a reasonably

conceivable, legitimate public purpose. State v. Bowman, 104 Idaho at 42, 655 P.2d at ___; State v. Cantrell, 94 Idaho 653, 655, 496 P.2d 276, ___ (1972). As we stated above, it seems reasonable for the legislature to impose a time requirement before providing compensation for diseases which take a considerable period of time to develop. Thus, we hold that I.C. § 72-439 does not violate the equal protection clause of either the United States or Idaho Constitutions.

Appellants further assert that the statute violates the due process clauses of the two constitutions by establishing an irrebuttable presumption that causation is lacking whenever a claimant with a non-acute occupational disease has worked less than 60-days. The applicable

standard of analysis under a due process challenge is the same as under an equal protection challenge: whether the challenged law bears a rational relationship to a legitimate legislative purpose. Heese v. A & T Trucking, 102 Idaho 598, 635 P.2d 962; Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399. For the reasons stated above, we hold that I.C. § 72-439 survives a due process challenge as well.

The decisions of the Industrial Commission are affirmed.

No attorney fees on appeal.

Costs to respondent.

SHEPARD and BAKES, JJ., concur.

BAKES, J., concurring specially:

This is a troublesome case, and the dissenters are justifiably concerned with the result reached on these two claims. However, I do not believe that the problem results from an improper interpretation of the statute by the majority of the Court, or by the claim that the constitutional protection against denial of due process or equal protection has been violated. Rather, the real concern lies in the fact that an occupational disease which disabled two workmen in less than sixty working days each was determined to be "non-acute" and therefore non-compensable under I.C. § 72-439. If the results in this case is wrong, the wrongness relates to the factual finding of the Industrial

Commission that the occupational disease from which these two claimants were suffering was non-acute. However, there is substantial competent evidence to sustain that finding, and accordingly the commission's decision must be affirmed. Idaho Const., Art. 5, § 9, I.C. § 72-732; e.g., Hays v. Amalgamated Sugar Co., 104 Idaho 279, 658 P.2d 950 (1983); Graham v. Larry Donohoe Logging Co., 103 Idaho 824, 654 P.2d 1377 (1982); Ford v. Bonner County School Dist., 101 Idaho 320, 612 P.2d 557 (1980) (Supreme Court is bound by Industrial Commission's findings of fact and review is limited to questions of law).

Nevertheless, it seems to me that in future cases other medical evidence might be available to establish that such short

term exposure which results in disability, as has occurred here, might well be acute, rather than non-acute, and the Industrial Commission, as the finder of fact, might so find. That, to me, is the better way to solve a perceived inequity in these types of cases, rather than to disregard the clear meaning of the statute or to over-extend the Constitution in order to try to do justice in these cases.

HUNTLEY, J., dissenting.

The decision below demonstrates the type of mis-analysis which can flow from a failure to understand the purpose and intent of statutory language.

Specifically involved in the second paragraph of I.C. § 72-439:

72-439. LIMITATIONS.--An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in his employment and, unless disablement or death results within four (4) years in case of silicosis, or one (1) year in case of injurious exposure to such disease in such employment, or, in case of death, unless death follows continuous disability from such disease, commencing within the period above limited for which compensation has been paid or awarded or claim made as provided in this chapter, and results within four (4) years after the last injurious exposure.

An employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.

The genesis of the second paragraph and similar statutes in other states was to handle the situation where, for example, a coal miner developed black lung disease or a hard-rock miner developed silicosis

while working for a series of two or more employers. Since in such occupational diseases medical science was not able to determine which employment caused the disease, the policy was that as to those slowly developing diseases (non-acute), either that (1) the last employer for whom the workman had worked at least 60 days would be responsible; or (2) that responsibility would be apportioned among all employers for whom the man had worked at least 60 days. Larson Workmen's Compensation Law, Volume 4, Section 95, contains the following bold face which explains the origin and purpose of statutes of this nature throughout the United States:

> § 95.00 When a disability develops gradually, or when it comes as the result of a succession of

> accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation. In some jurisdictions apportionment has been worked out by judicial decision, or provided for by express statute, when events within the coverage periods of successive insurers contribute causally to the final disability.

Typical statutes are that of Oregon[1] and West Virginia. In McClanahan vs. Workmen's Compensation Commission, 207 S.E.2d 184 (W.Va. 1974), the court commented:

> This Court notices that silicosis is an occupational disease which develops from protracted exposure to dust. However, the Legislature has determined that charges for silicosis disability shall be apportioned among employers for whom the claimant worked for a least sixty days within three years of the last exposure, W.Va. Code, 23-4-1 (1971), and that the date of injury shall be considered the date of last exposure. (207 S.E.2d at 186).

In the cases of both Bint and Dalton, the evidence is undisputed that their claimed disabilities are from inhaling cedar dust and the only employment where they were exposed is Creative Forest Products.

Thus, in terms of its purpose, the paragraph and its 60-day exposure requirement is inapplicable.

However, even if the Commission was required to give meaning to the statute, it should be interpreted in a manner which would not result in its being unconstitutional by setting up arbitrary and unreasonable classifications.

Reading the record, it is clear neither the Commission nor the doctors testifying had a clear understanding of

the meaning of "acute" or "non-acute" in terms of this statute.

The surety argues that under this Court's ruling in Jones v. Morrison-Knudsen Co., 98 Idaho 458, 567 P.2d 3 (1977), we implicitly recognized that "non-acute" refers in the method of onset (cause?)of a disease, and the surety now urges that position. Yet the doctors testifying herein defined non-acute, not in terms of causation but in terms of length of time it takes the symptomatology of the disease to develop.[2]

The absurdity of the application of the statute to cases of this nature can be illustrated by one example: Suppose a workman was employed at the National Engineering Lab for only 15 days and inhaled a particle of radioactive dust on

one occasion which caused lung disease three years later. Radiation exposure being an occupational disease, was this disease acute or non-acute? Under the Commission's ruling (and the decision of this Court), it would be non-compensable.

In Mr. Bint's case it is agreed he had worked 59 days. On the 59th day he had an appointment (set up by the employer) to see Dr. Venning for the subject problem. Dr. Venning instructed Bint to not go back to work in the cedar dust environment.

Thus, the rule sought by the surety and adopted by the Commission means that if an employee contracts a disease at his employment with serious effects within, say 45 days, to get compensation he must stay on the job and suffer 15 more days

of exposure before he qualifies for coverage. Clearly, neither the acute/non-acute dichotomy nor the 60-day requirement itself have any relationship to whether or not a person has contracted an occupational disease from a specific employment. To deny a claimant workman's compensation benefits simply because his onset of symptoms was non-acute, and because he did not work for more than 60 days, has no relationship to the stated policy under I.C. § 72-201 of providing sure and certain relief for workmen contracting occupational diseases, and therefore clearly represents an arbitrary and unreasonable classification in violation of the equal protection clauses under the Federal and Idaho Constitutions.

I would reverse with instructions providing a constitutional gloss on the statute, that is that it applies to circumstances where there are successive employments causing the occupational disease but that it is inapplicable where the evidence establishes only one causative employment.

Footnotes to Huntley Opinion.

[1] 3. Permanent Partial Disability. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer, shall alone be liable therefore, without right to contribution from any prior employer or insurance carrier, provided, however, that in the case of silicosis or asbestosis, the only employer and insurance carrier liable shall be the last employer

in whose employment the employee was last exposed to harmful quantities of silicon dioxide (S_1O_2) dust on each of at least sixty (60) days or more, and the insurance carrier, if any, on the risk when the employee, was last so exposed under such employer. (85 O.S. 1971, § 11(3)).

[2] Dr. Torrington testified as follows regarding the onset of the claimant's disease:

> Q. Doctor, in your specialty, do you diagnose between acute and non-acute disease processes?
>
> A. Yes.
>
> Q. And in Mr. Dalton's case based on the history he related to you about his employment with Creative Forest Products and the onset of his symptoms, do you regard his condition as being acute or non-acute?
>
> * * *
>
> A. It--the question is another difficult one. I believe that the symptoms as they initially progressed began as a very sub-acute or indolent or chronic-type of progression but, by the time after he had been working for

several months-- with the planer and sanding equipment, I think he had acute asthma.

And I think that he was acutely ill by that time he was sick, and he needed treatment. Is that--

A. Well, let me ask you this one: when you use the term acute in this sense of acute asthma, are you referring to the degree of the symptomatology that one experiences?

A. Yes.

Q. Alright. In terms of the disease process and how the process develops, do you regard that disease process occurred in a non-acute manner in terms of the symptomization that ultimately related to the asthma.

Bistline, J., concurs.

BISTLINE, J., dissenting separately.

A fact of life is that the fines of red cedar dust do not exit an employee's respiratory system the instant the employee leaves the place of employment.

Other than for those fines expelled by coughing or sneezing, these disease producing particles are thereafter with the employee--doing him bodily damage whether he is working or is not working. Here, as Justice Bakes in his special concurrence concedes, two working men were rendered disabled in less than 60 working days. This will suggest to any reasonable mind that the ravages of cedar dust against the unfortunately susceptible move swiftly and relentlessly. Although the employee does not work a 24-hour daily shift, the dust in his system does.

All of which leads me to say that the case relied upon by the Commission, McLean v. Hecla Mining Co., 62 Idaho 75, 108 P.2d 299 (1940), was either poorly

decided or erroneously decided, or both. The short opinion in that case shows that it was released on December 10, 1940, based only on the authority of Habera v. Polaris Mining Co., 62 Idaho 54, 108 P.2d 297, also released that very same December 10, 1940, which is remarkable. Especially when, as the practicing bar has long known, this Court seemingly goes into a veritable frenzy of releasing opinions near the end of the year when statistics are important because the legislature is about to convene.

Equally remarkable, in both cases the claimant-respondent was not represented in proceedings before this Court, either by counsel or in person. The grounding of the McLean decision on Habera was not sound. Habera, a miner as was McLean,

was only employed by Polaris a total of 20 days. We are not talking about working days, but the total period of employment! Obviously Habera had not been at Polaris exposed to the hazards of the diseases for 60 days. Moreover, as the opinion discloses, he had gone to work on a conditional basis, the condition being that he was required to take and pass a physical examination. He was given the examination at the end of two weeks, with x-rays revealing "a moderate degree of silicosis, scaling of both apices with evidence of tuberculosis." 62 Idaho at 55, 108 P.2d at 298. This conditional employment was terminated five days later. Where Habera had only been in the employ of Polaris for 20 days, the Court could readily say as it

did that he had not been exposed to the hazards of the disease by employment with Polaris for 60 days.

McLean, however, is a different matter. After reciting the provisions of the law, "'An employer shall not be liable for any compensation for a non-acute occupational disease unless such claimant was exposed to the hazard of such disease for a period of sixty days for the same employer,'" McLean, supra, at 77, 197 P.2d at ___, the Court, inadvertently one would hope, by changing the language of the law it had just recited was able to say, and hold:

> In this case, even though the claimant might have carried the cedar dust in his lungs subsequent to his last exposure or in time periods between exposure, those times cannot be considered in calculating the necessary 60 days

> of exposure to the hazards of the disease. See McLean v. Hecla Mining Co., supra; Jones v. Morrison-Knudsen Co., Inc., supra.
>
> The claimant's Motion for Reconsideration is hereby denied.
>
> Order Denying Claimant's Motion for Reconsideration, R., p. 29.

Quare: Will this Court rise to the occasion and overrule the McLean case which stands as a barrier precluding the Commission from administering the Worker's Compensation Law fairly as well as liberally?

ADDENDUM

After the foregoing was written, the Clerk's Office was able to retrieve and hand me the Habera and McLean files. If it be that any members of the Court require factual justification for overruling McLean, these interesting files provide it.

Habera. In proceedings before the Industrial Accident Board (as the Industrial Commission was then called), Polaris responded to Habera's pro se claim with this answer:

> Come now the defendants and as a joint and several Answer to the Application for Hearing herein and Claimant for Compensation, admit, deny and allege as follows:
>
> I.
>
> The defendants deny each and every allegation therein contained except as hereinafter admitted in this Answer. The defendants admit that the claimant worked for the various period of time and for the various employers named in said Application and said Claim; the defendants further allege that the claimant did not given said employer written, or other notice of the manifestation of the alleged silicosis within 60 days after the alleged first manifestation, if any, thereof, and in that respect the defendants allege that claimant never gave said employer written or other notice of the manifestation of the alleged silicosis until April 29, 1940.

> WHEREFORE, the defendants herein having fully answered claimant's Application for Hearing and Claim for Compensation pray that the claims be denied and the Application be dismissed.

It is at once observed that Polaris did not plead the 60-day exposure requirement of I.C.A. § 43-2109 (now I.C. § 72-439). Nor did Polaris plead the similar requirement of I.C.A. § 43-2107, which fixed liability in silicosis cases solely upon the last employer where "the employee was last injuriously exposed to the hazards of the disease during a period of sixty days or more after the effective date of this chapter."[1]

The only affirmative defense pleaded was the requirement of 60-day notice of I.C.A. § 43-2126, which bars a claim for occupational disease compensation "unless

written notice of the manifestation of an occupational disease shall be given by the workman to the employer within sixty days after the first manifestation thereof . . ." which is the exact language found in the Polaris answer. The Industrial Accident Board made findings and conclusions in favor of Habera, and awarded him total compensation of $240, computed at $12 per week for twenty weeks.

Only on the appeal from the Board's award did Polaris for the first time raise the 60-day exposure requirement by a specification of error that the "findings of fact do now show . . . that respondent had been in injuriously exposed to the hazards of an occupational disease, silicosis or otherwise, during a

period of sixty days while in the employment of said employer."

As Point and Authority No. VII, Polaris stated:

> Since respondent had been employed by his employer herein for a period of only 20 days (from October 15, 1939, to November 5, 1939), prior to respondents' discharge, under no circumstances could appellants be liable for any compensation for non-acute silicosis, because the employment had not been for a period of 60 days prior to such discharge.
>
> I.C.A. secs. 43-2109, 43-2107; 43-2121; 43-2122;
>
> (Emphasis original.)

It also cited in re Jeffries, 14 N.E.2d 751, which was also cited in the Habera opinion.

Further elaboration is unnecessary. The Court simply broke the rules in deciding the case on an issue which had

not been submitted to the Industrial Accident Board. In doing so it treated the unrepresented workman unjustly. What does appear from reading the Polaris brief is that counsel correctly read the statutes as requiring a 60-day period of employment, not 60 working days of exposure in the mines. Why did the Court break the rules?

McLean. McLean was submitted to the Industrial Accident Board at Wallace one day after Habera. The McLean decision and award were made on the same date as Habera. There was more at stake in McLean, however, than the $450 total award. Counsel for Hecla, now deceased but well-known to us few remaining older practitioners, Chas. A. Horning, in a three and one-half page answer filed with

the Board, affirmatively alleged I.C.A. § 43-2107, and further alleged the unconstitutionality of I.C.A. § 43-2122 by reason of ambiguity, uncertainty, and indefiniteness--which would be the main premises of his appeal to this Court--to challenge the 1959 Act which provided benefits for people contracting occupational diseases. The Court in McLean, supra, at 78, ___ P.2d at ___, accurately states Hecla's constitutional specification of error, and on the same page ducks the issue by reason only of having first allowed itself to be confused concerning 60 days of exposure to the hazards of the disease and 45 days of exposure to the hazards of employment, based, of course, on Habera.

To which should be added that Mr. Horning, in hot pursuit of an answer to his important constitutional issue[2] did not in his appeal brief specify as error the Board's failure to apply I.C.A. § 43-2109 in the manner which the Court would gratuitously do it for Hecla. The specifications of error are appended.

In ARGUMENT, Mr. Horning opened his brief thusly:

> My principal contention upon this appeal is going to be that Section 43-2122, I.C.A., under which the respondents' claim for compensation was filed and upon which the award in respondent's favor was based, is unconstitutional and void. I shall discuss this question first and shall then discuss the other points which I have raised, upon the assumption, for the sake of argument only, that Section 43-2122 is not void.

Nothing in argument even touched upon the applicability of I.C.A. § 43-2109.

Moreover, returning to proceedings before the Board, the very short reporter's transcript reveals that the 60-day requirement issue pleaded in Hecla's answer was not pursued in the slightest. In clarifying what issues were before the Board Accident Board Member Suppiger stated:

> We understand this application is under Section 43-3133 I.C.A. or under what is known as the Occupational Disease Compensation Law. We understand further that there are only three main issues involved, which we understand to be the question as to whether the man has a non-disabling silicosis, was he discharged from his employment because he had such non-disabling silicosis and did he by reason of that discharge suffer a wage loss. We would like to have you confine the matter as closely as you can to that.

Later on, the third issue--whether McLean suffered a wage loss--was stipulated to

in the affirmative, leaving Mr. Suppiger to state: "All right. Now then, as we understand it, it leaves but two issues. Did he have a non-disabling silicosis and was he discharged on account thereof and the amount of his wage loss."

Thus, the first time that the statement that Idaho's Occupational Disease Act requires 60 working days of exposure to hazards of disease surfaces is in the body of the McLean opinion; it was never argued before the Accident Board in either Habera's or McLean's hearings, nor before this Court on the two appeals. And then, the McLean Court can only cite to Habera for authority, which citation is erroneous, since it is readily apparent that Habera held nothing of the sort. McLean has no validity.

Footnotes to Bistline Opinion.

[1] I.C.A. §§ 43-2109 and -2108 were so designated in Idaho Sess. Laws, ch. 161, which created the Occupational Disease Compensation law. The enactment became effective July 1, 1939.

[2] The Court at page 78 saw merit in his contentions, but passed the problem on to the legislature, which was to convene within a month.

IN THE SUPREME COURT OF THE
STATE OF IDAHO

GEORGE A. BINT, Claimant-Appellant, v. CREATIVE FOREST PRODUCTS, ET AL., Defendants-Respondents.	)	O R D E R NO. 15192
EDWIN W. DALTON, Claimant-Appellant, v. CREATIVE FOREST PRODUCTS, ET AL., Defendants-Respondents.	)	NO. 15392

The Appellants having filed a PETITION FOR REHEARING on February 14, 1985, and supporting BRIEF on February 27, 1985 of the Court's Opinion released January 29, 1985; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellants' PETITION FOR REHEARING be, and hereby is DENIED and the dissent on denial of Petition for Rehearing by Bistline, J., be, and hereby is, RELEASED.

DATED this 11th day of April, 1985.

By Order of the Supreme Court

/s/ Judy E. Cizmich, Deputy
Frederick C. Lyon, Clerk

cc: Counsel of Record

1985 Opinion No. 64

IN THE SUPREME COURT OF THE
STATE OF IDAHO
NOS. 15192 and 15392
Boise September 1984 Term
FILED: April 11, 1985
FREDERICK C. LYON, Clerk

GEORGE A. BINT,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, ET AL.,

Defendants-Respondents.

EDWIN W. DALTON,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, ET AL.,

Defendants-Respondents.

ON DENIAL OF PETITION FOR REHEARING

BISTLINE, J.

On the petition for rehearing the votes to grant of Justice Huntley and myself were insufficient under the rules of the Court. Had even one member of the majority voted for a rehearing, then, in this very important case the Court would have expended one hour of its valuable time in hearing oral argument--and perhaps not even that. The lesson to be learned is that three not only beats two, but that three, when so motivated, can avoid a rehearing. Which may be well in some cases, because it is necessary to keep the production line moving. However, rehearings have been granted in other cases of considerably less legal moment, which may present a genuine concern to the trial bar.

Doubting that anything added at this stage can work any miracle, I write only to suggest the error in not granting a rehearing. The Court is not asked to Ipso facto reverse it position--only to give the important issues deserving further consideration.

Justice Huntley and I wrote independently of each other. His dissenting opinion spelled out persuasively the purpose and intent of I.C. § 72-439 which states the requirement that for a non-acute occupational disease the employer shall not be liable for any compensation unless the employee was exposed to the hazard of the disease for sixty days in the same employment. His well-reasoned opinion had no impact upon a majority bent upon standing fast to a holding

"that the 60-day exposure requirement . . . means that the employee must have worked on 60 calendar days for the same employer before the employer is liable . . . ." The text of I.C. §72-439, which does not appear in the majority opinion, does not so provide. It requires a 60-day period of employment. No mention is made of calendar working days. The holding of the majority is pure ipse dixit. It is said to be fortified by Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977) and by McLean v. Hecla Mining Co., 62 Idaho 75, 108 P.2d 299 (1940).

The majority, although cognizant of the Industrial Commission's acknowledgment that claimant carried the dust in his lungs in-between calendar working

days, and was thus exposed, adamantly declined to follow its own admonition to "see McLean v. Hecla Mining Co." Accepting that advice, McLean was visited, not just the Idaho Reports, Vol. 62 at p. 75, but the original appeal record and briefs. A report of my in-depth inquiry into McLean and its companion case, Habera v. Polaris Mining Co., 62 Idaho 54, 108 P.2d 297 (1940), was presented to the majority in a documented dissent which illustrated beyond any reasonable doubt that McLean had no validity whatsoever, and Habera merely set the stage for avoiding attorney Horning's well-mounted constitutional attack on the newly enacted Occupational Disease Compensation Law. Turning Mr. Horning's argument and authority aside, the Court said:

> We do not find it necessary to pass upon the constitutionality of the statute, in order to decide the case and, therefore, will not do so. . . . However, we recommend that the legislature, which will convene shortly, give careful attention to the provisions of the Occupational Disease Compensation law, and, particularly, that portion of it having to do with silicosis, to the end that its provisions be clarified.
>
> McLean, supra, at 78, 108 P.2d at ___.

While it is not difficult to understand why the Court chose to throw this hot potato to the legislature with the latter about to meet, I blush for the manner in which it was dismissed--at the expense of the claimant McLean and his $480 total award. Unfortunately, the escape from passing on the constitutional question in such a manner has perverted the compensation law for now almost a half century.

Here the Commission and its referee were bound by it. This Court, however, is not so restricted.

Touching upon the theme of Justice Huntley's opinion, and fortifying it in the utmost, is the original 1939 enactment, to which my attention was attracted upon being advised to "see McLean." I.C. § 72-439 has remained unchanged since it was first enacted in 1939 and was first § 43-2109 of the Idaho Code Annotated. See 1939 Idaho Sess. Laws, ch. 161, p. 290. On that same page also find § 43-2107, which, as I understand it, was a six-year transitory statute, after which it was of no effect. I do not tongue-in-cheek say "see sec. 43-2107 in the Session Laws," because, if it has ever been re-enacted and is still extant statutory law, I am

unable to find it in the Idaho Code. Justice Huntley discovered § 43-2107 after our opinions were released, and furnished the members of the Court with copies thereof. It provides:

> 43-2107. LAST EMPLOYER LIABLE --AMOUNT OF COMPENSATION. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease shall be liable therefor; the amount of the compensation shall be based upon the average weekly wages (as defined in the workmen's compensation law) of the employee when last so exposed under such employer; and the notice of disability and claim for compensation shall be given and made to such employer; provided, however, that the maximum compensation to be allowed for disability, or death, or both, on account of any occupational disease, other than silicosis, shall be $5,000.00, until a transitory period of six years from the date when this chapter becomes effective shall have expired, and thereafter the total aggregate of such compensation and benefits shall be as provided in

> the workmen's compensation law; provided further that in case of silicosis the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of sixty days or more after the effective date of this chapter. (Emphasis added.)

Doubters as to the validity of Justice Huntley's earlier opinion can not read the foregoing without having their doubts eradicated. Just as he wrote, a purpose of the new occupational disease law was to indeed fix liability upon the last employer--thus avoiding complex and almost impossible apportionment problems. Section 43-2107, taken together with § 43-2109, clearly establishes that, in determining who was the last employer,

the requirement is a 60-day period of employment.

Moreover, § 43-2107 serves to completely obviate the philosophic worries which a majority of a 1985 Supreme Court are plagued with as to the workings of the 1939 legislature, particularly:

> Workers' compensation does not purport to be a social insurance program covering all a worker's health problems. The legislature has a legitimate interest in seeing that coverage for occupational diseases be kept within reasonable limits and in controlling the financial impact on Idaho industry and consumers. The legislature might have determined that these interests made it reasonable to establish a condition precedent of 60 days exposure before imposing liability for non-acute occupational diseases. The legislature might also have determined that it would be unfair to impose liability on employers for time-related diseases without imposing a corresponding time requirement on the employment relationship. (Emphasis added.)

Those speculative meanderings as to what the 1939 legislature might have intended have no genuine purpose in an opinion for the Court. It is readily seen from § 43-2107 that the 1939 legislature was able to determine for itself. First, observe that with a proper regard for the imposition of the new law upon industry, that a maximum limit of $5,000 was imposed, to be in effect for a six-year transitory period. This, together with the last employer provision was adequate --in the legislative mind--and served well in "controlling the financial impact on Idaho industry," the main concern of a 1985 majority of this Court.

This Court in its 1939 McLean decision undoubtedly did not perceive the mischief which it was working in misstating the

law in order to avoid the difficult constitutional issue presented to it. The injury done to the working man or woman by that mischief has remained uncovered until the year 1985. This Court can now undo that mischief. A majority of the Court refuses to do so or explain any reasons. Two wrongs do not make a right.

HUNTLEY, J., concurs, and concurs also in the dissenting opinion of BISTLINE, J., of January 29, 1985.

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

GEORGE A. BINT, Claimant, vs.	)	IC 82-391066
CREATIVE FOREST PRODUCTS, Employer, and	)	FINDINGS OF FACT CONCLUSIONS OF LAW, AND ORDER
MARYLAND CASUALTY COMPANY, Surety, Defendants.	)	FILED AUG 1, 1983

The Claimant in the above-entitled matter filed an initial Application for Hearing with the Industrial Commission on July 20, 1982. An amended Application for Hearing was filed with the Industrial Commission on August 11, 1982. Counsel for the Defendant filed a timely Answer.

Defendants subsequently filed with the Industrial Commission a motion to bifurcate the matter and set a hearing on the issue of whether the Claimant's claim is barred by Section 72-439, Idaho Code. The Defendants' motion was granted and the matter was set for hearing on the limited issue of whether the Claimant's claim was barred by Section 72-439, Idaho Code. The matter was assigned to Referee Aliza D. Bethlahmy, who conducted a hearing in the matter in Boise, Idaho on February 23, 1983. Following the hearing, the matter was continued for depositions. The final deposition was filed with the Commission on May 16, 1983. The depositions have been marked and admitted as Claimant's Exhibit 3 (the

Deposition of Dr. Venning) and Defendants' Exhibit 4, (the Deposition of Dr. Torrington). A briefing schedule was established. The final brief has been filed with the Commission and the matter is now ready for decision.

NOW, having considered all of the evidence presented in the matter and having considered the submitted briefs, the Referee enters the following proposed Findings of Fact, Conclusions of Law, and Order, which she recommends the Commission approve and adopt as its decision.

FINDINGS OF FACT

I

The Claimant began his employment with Creative Forest Products on January 6, 1982. The last day he worked was

March 9, 1982. He began work as a general laborer. He subsequently became a shaper operator and finally a shaper supervisor. His final rate of pay was $4.00 per hour.

II

The Employer has three work shifts, a 7:00 a.m. to 3:00 p.m. shift, a 3:00 or 4:00 p.m. to 10:00 p.m. shift, and a 10:00 p.m. to 6:00 a.m. shift. When the Claimant began working as a laborer, he worked days. When he became a shaper supervisor, he was on 24-hour call and his hours of work were not restricted to the day shift.

Despite the fact that the Claimant's period of employment for the Employer exceeded 60 days, if one counts actual

calendar days of work, the Claimant worked a total of 59 calendar days for the Employer.

The Referee finds that the Claimant worked on 59 calendar days for Creative Forest Products.

III

The Claimant first experienced abnormal symptoms on February 7 or 8, 1982. His physical complaints began with a sore raspy throat. He next developed chest pains and a cough. He lost his voice on three separate occasions. He first lost his voice on February 20 or 21, 1982. He coughed up phlegm and sawdust. He had a runny nose.

The Claimant's supervisor suggested that the Claimant see Dr. Venning, which the Claimant did on March 9, 1982.

IV

Dr. Venning suggested that the Claimant cease work instantly, so he could determine whether the Claimant did have an occupational pulmonary and nasal disease. See Deposition of William L. Venning, M.D., p. 9, L.19 to p. 10, L.7.

Dr. Venning's opinion was that the Claimant had an occupational pulmonary disease, even if one considered the possibility of hypersensitivity. His opinion was that the Claimant should definitely not go back to work around red cedar dust. He also rendered the opinion that the Claimant had not suffered any

permanent partial impairment as a result of his exposure while employed at Creative Forest Products. See Deposition of William L. Venning, M.D., p. 14, L.3 to L.14.

V

Dr. Torrington examined the Claimant on March 17, 1982. On March 23, 1982, he had the Claimant undergo a pulmonary test. On that date, the Claimant's lung volume measurement was normal He then underwent an inhalation challenge test to red cedar.

Dr. Torrington's opinion was that the Claimant had an occupational disease. He characterized it as being non-acute in nature. He characterized the Claimant's occupational disease as being non-acute

on the basis that, medically speaking, the Claimant's disease had an insidious onset, rather than an acute onset. The physician's opinion was the Claimant's pulmonary function testing revealed that the Claimant had a reversible small airways disease. He did not believe that the Claimant had a specific allergy to red cedar dust (a specific allergic reaction due to the release of plactic acid). He did believe that the Claimant's exposure to the dust itself resulted in the irritation to his airways.

Dr. Torrington indicated that the Claimant's symptoms came on gradually and, for that reason, he would not consider the disease process to be acute in nature. He also indicated that the

Claimant's lack of response on the inhalation challenge testing failed to show an acute response to the inhalation of the dust and finally, the majority of patients who develop red cedar induced asthma do so over a period of time which indicates the cedar induced asthma is also of a chronic type of disease process. See Deposition of Kenneth G. Torrington, M.D., p. 25, l.9, to p. 26, L.13 and p. 35, L.13 to p. 36, L.12.

CONCLUSIONS OF LAW

I

This matter is currently before the Industrial Commission solely on the issue of whether the Claimant's claim for workmen's compensation benefits is barred by Section 72-439, Idaho Code.

Section 72-439 Idaho Code, provides, in part, as follows:

> "An employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer."

II

The Referee will first address the question of whether or not the Claimant meets the 60-day "exposure rule" contained in Section 72-439, Idaho Code.

The Claimant in this case worked on 59 calendar days for Creative Forest Products. Counsel for the Claimant argues that although the Claimant worked 59 days, his exposure was actually 60 days if one considers the overtime work he performed. Counsel for the Claimant

argues that because of the Claimant's over-time work, the Claimant's exposure should be judged on the basis of equivalent work days and not calendar days, i.e., certain work days should be considered to be in excess of one day's exposure.

The Referee does not find the argument persuasive. The statute provides that an employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of 60 days for the same employer. The Referee believes that the correct interpretation of the phrase "exposed to the hazard of such disease for a period of sixty (60) days" requires that the

claimant's exposure time be calculated in terms of 60 calendar days of work, regardless of the fact that on some of the days the claimant worked in excess of eight hours. Although more than sixty days have elapsed between the Claimant's date of hire and his separation from employment, his exposure to the hazards of employment was only 59 days. See McLean v. Hecla Mining Co., 62 Idaho 75, 108 Pac2d. 299 (1940).

While the Claimant's argument might prove helpful to this particular claimant, it does not appear to the Referee that it is a correct interpretation of the statute. The statute speaks in terms of 60 days of exposure and not 60 eight-hour days of work. Under the

interpretation of the statute urged by the Claimant, an employee who worked two hours per day for 60 days was exposed to the hazards of such disease for that entire time would not be able to recover for an occupational disease. The Referee concludes that the proper interpretation of the "60 days of exposure" required by Section 72-439, Idaho Code, requires that in this case, each of the Claimant's calendar days of work be considered one day of exposure to the hazard of his occupational disease.

III

Since the Claimant's exposure in this case was for a period of 59 days and not 60 days as required by the statute, the

issue of whether the occupational disease is acute or non-acute is relevant.

The applicable dictionary definition of the word "acute" is "having a sudden onset, sharp rise, and short course." The medical world also defines the word "acute" in terms of having a short and relatively severe course.

Schmidt's Attorneys Dictionary of Medicine contains the following definition of "acute":

> "With reference to a disease, having a sudden onset and a short, but rather severe, course; opposed to chronic, which designates a rather slow onset and a protracted, but mild, course."

Dr. Torrington characterized the Claimant's disease as not being acute in nature in that the Claimant's symptoms

came on gradually, they evolved after the first month of employment, and he would characterize the disease process as having a chronic or insidious onset, rather than an acute onset. His opinion was that the Claimant's symptoms were not of an acute nature. See Torrington Deposition, p. 25, L.9 to p. 26, L.13.

The Referee concludes that the onset of the Claimant's disease was not acute.

IV

Counsel for the Claimant argues that the focus of Section 72-439, Idaho Code, is not whether the initial development of the disease is acute or non-acute, but rather whether the nature of the disease is acute. He would argue that the Claimant's disease is acute based on Dr.

Venning's testimony concerning the Claimant's acute reaction to the tests Dr. Torrington had the Claimant undergo on March 23, 1982.

Taking the view most favorable to the Claimant, which would be that the term "non-acute occupational disease" refers to the nature of the disease, rather than the onset of the disease, the evidence in the record does not establish that the Claimant's occupation disease was acute. The only evidence in the record which even suggests acute symptomology in this case is that Dr. Venning saw the Claimant after the testing on March 23, 1982 and he stated that the Claimant had an acute reaction to the testing. The Claimant's acute reaction to the testing does not

establish that the Claimant's disease was of an acute nature. Dr. Venning indicated that the medical profession classifies symptomatic conditions as acute or non-acute and he further indicated that he did not see the Claimant on the morning of the testing and that if Dr. Torrington's physical examination was done that morning and Dr. Torrington found nothing, then the hoarseness which he saw in the Claimant on the afternoon of March 23, 1982 was produced by the test. See Deposition of William L. Venning, M.D., p. 12, L.25 to p. 13, L.17.

Neither Dr. Venning nor Dr. Torrington testified that the Claimant's occupational disease was acute. Dr. Torrington did testify that the Claimant's condition

was non-acute both in nature and in onset.

There is no evidence in the record to support a conclusion that the Claimant's occupational disease is acute. Since the Claimant's exposure was for 59 days rather than 60 days, and his occupational disease was non-acute, the Claimant's claim for compensation must be dismissed pursuant to the statute of limitations set forth in Section 72-439, Idaho Code, relative to non-acute occupational diseases.

V

Counsel for the Claimant raises constitutional arguments relative to the 60-day "exposure rule" contained in Section 72-439, Idaho Code.

The Referee notes that the Claimant argues that not only is the 60-day exposure aspect of the statute arbitrary, but that it also creates an irrebutable presumption. He argues that the distinction between acute and non-acute is arbitrary and unreasonable.

While the 60 day exposure rule set out in Section 72-439, Idaho Code, is arbitrary, the Idaho Supreme Court, in the past, has ordered the Industrial Commission to dismiss a claimant's application for compensation in a case where the claimant suffered from non-disabling silicosis because the claimant had not met the statutory requirements of being exposed to the hazards of the disease during a period of 60 days or more.

That statutes in question in that particular case were part of a new chapter enacted by the 1939 Legislature which provided workmen's compensation coverage for certain enumerated occupational diseases. The act set forth certain limitations on an employee's recovery. It also distinguished between non-disabling silicosis and disabling silicosis. The Court noted that the statutes in question were a departure from the original compensation law and were intended to include certain occupational diseases not previously covered. The Idaho Supreme Court indicated, with regard to such an attempt, the following:

> "In attempting to do so, the Legislature evidently anticipated difficulty in the application of

> such an act unless very definite bounds were fixed within which it might operate. It accordingly prescribed certain limitations and prohibitions (secs. 43-2117, 43-2119)."

See Habera v. Polaris Mining Co., 62 Idaho 54, 108 PAC.2d 297 (1940).

Although the Referee believes, based on various Supreme Court cases, that both the distinction between acute and non-acute diseases and the 60-day exposure requirement would be upheld, she declines to rule on the constitutionality of the statute. See Wanke v. Ziebarth Construction Co., 69 Idaho 64, 202 P.2d 384 (1948).

The Referee recommends that the Commission dismiss the Claimant's claim for workmen's compensation benefits on

the basis of the limitations set forth in Section 72-439, Idaho Code.

O R D E R

IT IS HEREBY ORDERED, and this does order, that the Claimant's claim for workmen's compensation benefits is hereby, DISMISSED.

/s/ ALIZA D. BETHLAHMY
Aliza D. Bethlahmy, Referee

O R D E R

The Commission has reviewed the record and the foregoing Findings of Fact, Conclusions of Law and Order, and hereby approves and confirms the same, and adopts them as the Decision and Order of the Commission. The Decision is ordered filed by the Secretary of the Commission.

DATED and FILED this 1 day of Aug., 1983.

INDUSTRIAL COMMISSION

Will S. Defenbach, Chairman

/s/ GERALD A. GEDDES
Gerald A. Geddes, Member

/s/ LAWRENCE G. SIRHALL
Lawrence G. Sirhall, Member

ATTEST:

a/s Patricia S. Ramey
Patricia S. Ramey,
Secretary

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

GEORGE A. BINT, Claimant, vs. CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety, Defendants.	)	IC 82-391066 ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION FILED AUG 23, 1983

The Commission entered its decision in the above entitled matter on August 1, 1983. On August 4, 1983, the Commission received the Claimant's Motion for Reconsideration in the matter.

ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

Counsel for the Claimant requests reconsideration in the matter arguing that the Commission did not address all of the issues raised by the Claimant and, in particular, that the Commission failed to address Claimant's argument that he was "exposed " to cedar dust over his entire 63-day period of employment on the basis that the cedar dust was carried in the Claimant's lungs subsequent to his last exposure.

Claimant's argument that the exposure requirements of Section 72-439, Idaho Code, can be interpreted to include the Claimant's entire period of employment and not just the days he was actually exposed to the hazard of the disease was

considered by the Commission and the Commission declined to adopt such interpretation.

The Commission believes that the proper interpretation of Section 72-439, Idaho Code's phrase "exposed to the hazard of such disease for a period of sixty (60) days for the same employer" requires that the Claimant's exposure time be calculated on the basis of number of days at work within the hazardous environment. In other words, although there might be more than 60 days between the Claimant's date of hire and his last day of employment the entire period of the Claimant's employment with the Employer does not constitute days of exposure to the hazards of the disease. The Claimant's exposure to the hazards of

the disease occurs only on the days he works within the hazardous environment. See McLean v. Hecla Mining Co., 62 Idaho 75, 108 Pac.(2d.) 299 (1940) wherein although more than 60 days elapsed between the date on which the worker was hired by the employer and the date on which he was discharged, the individual had only worked forty-five days and the Court indicated that the employee's exposure to the hazards of the employment was 45 days, at most.

The Commission also directs the Claimant's attention to Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977), wherein the claimant in that case worked for the same employer on separate occasions, but not all periods of

work were around wet cement which, in that case, was the hazardous substance, and the matter was remanded to the Industrial Commission for the Commission to make findings concerning the date of the Claimant's last exposure to the substance while working for Morrison-Knudsen. In that case, the Idaho Supreme Court indicated that the Claimant's 60 days of exposure to the hazardous substance need not be continuous and directed the Commission to compute the Claimant's exposure during both periods of the Claimant's work around cement, i.e., the times when he was exposed to the hazardous substance.

In this case, even though the Claimant might have carried the cedar dust in his lungs subsequent to his last exposure or

in time periods between exposure, those times cannot be considered in calculating the necessary 60 days of exposure to the hazards of the disease. See McLean v. Hecla Mining Co., supra; Jones v. Morrison-Knudsen Co., Inc., supra.

The Claimant's Motion for Reconsideration is hereby denied.

O R D E R

IT IS HEREBY ORDERED, and this does order, that the Claimant's Motion for Reconsideration is hereby DENIED.

DATED and FILED this 23 day of August, 1983.

INDUSTRIAL COMMISSION

/s/ WILL S. DEFENBACH
Will S. Defenbach, Chairman

/s/ GERALD A. GEDDES
Gerald A. Geddes, Member

/s/ LAWRENCE G. SIRHALL
Lawrence G. Sirhall, Member

ATTEST:

a/s Patricia S. Ramey
Patricia S. Ramey,
Secretary

ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

EDWIN A. DALTON, Claimant, vs. CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	IC 82-397517 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED JAN 26, 1984

The Claimant in the above-entitled matter filed an Application for Hearing on December 21, 1982. The Commission

assigned the matter to Randall Paddock, Referee, who conducted a hearing in Boise on June 1, 1983. The Claimant was present in person and he was represented by Richard K. Dredge Esq. of Jerry Goicoechea, Chartered. John W. Barrett, Esq. and Michael G. McPeek, Esq. of Moffatt, Thomas, Barrett & Blanton, Chartered, represented the employer and the surety. Sam Kaufman, Esq., represented the State of Idaho, Industrial Special Indemnity Fund. Both oral and documentary evidence was presented. At the conclusion of the hearing by stipulation of the parties, the record was held open and further evidence was submitted by deposition. After briefs were filed, the matter was submitted for decision.

FINDINGS, CONCLUSIONS, AND ORDER

NOW, THEREFORE, having reviewed the record, the Referee submits the following proposed Findings of Fact, Conclusions of Law, and Order which he recommends that the Commission approve and adopt as its decision.

FINDINGS OF FACT

I

The Claimant was employed by Creative Forest Products beginning December 7, 1981. That employment was subject to and covered by the Idaho Workmen's Compensation Law.

II

Creative Forest Products produces wooden patio furniture. The Claimant generally operated machines in the production area. Those machines broke down

frequently, leaving the Claimant with no work to do. The Claimant reported for work on days that the machines were broken down except on one or two occasions when he was telephoned and told not to report for work. He reported for work when the machines were broken down with the hope that there would be other work for him to do. On some days he would also come to work with his wife, who worked at Creative Forest Products on a later shift, and he would ask if there was work that he could do on her shift. When he reported to Creative Forest Products' plant, he would go to the production area to find the production manager who would tell him if there was any work for him. The Claimant was not required

to report for work on days when there was no work for him; he could have telephoned Creative Forest Products to determine whether there was any work for him. The Claimant's time cards establish that he reported for work on December 29, 1981. In addition to that day, the Claimant probably reported for work but did not work on four other days in December of 1981, three days in March of 1982, and four days in April of 1982.

III

The Claimant worked at Creative Forest Products from December 7, 1981 until January 12, 1982, when he suffered an injury to his finger. He returned to work on March 15, 1982 and worked there through April 23, 1982. During the time

that he was employed by Creative Forest Products, the Claimant worked all or part of forty-eight shifts.

IV

The machines in Creative Forest Products production area created dusty conditions in that area. Eighty-five to ninety percent of the furniture produced by Creative Forest Products is made of western red cedar. Over the period that he worked for Creative Forest Products, as a result of his exposure to red cedar dust in the course of his employment there, the Claimant developed an allergy to red cedar dust which led to asthma. The testimony of Dr. Torrington, who treated the Claimant, established that the symptoms that the Claimant developed

are characteristic of exposure to red cedar dust.

V

Prior to becoming employed at Creative Forest Products, the Claimant had chronic Lung disease. Dr. Torrington estimated that as a result of his preexisting chronic lung disease and the allergy and asthma that he developed while employed by Creative Forest Products, the Claimant had a permanent partial impairment equal to 25-35% of the whole person, of which he attributed about 1/3 to the Claimant's exposure to red cedar dust while working at Creative Forest Products. Based upon this testimony, the Referee finds that the Claimant has permanent partial impairment equal to 10% of the whole

person as a result of the allergy and asthma he developed from exposure to red cedar dust while employed by Creative Forest Products.

VI

As a result of the Claimant's pulmonary problems, Dr. Torrington felt that the Claimant should limit his lifting to twenty-five pounds on a frequent basis and fifty pounds on an occasional basis. The doctor also felt that the Claimant should climb stairs only occasionally. The doctor testified that dust and cold conditions may cause the Claimant's asthma to flare up, although he may be able to tolerate limited exposure to dust and cold conditions may cause the Claimant's asthma to flare up, although he may

be able to tolerate limited exposure to dust and cold; however, the doctor testified that the Claimant should absolutely not be exposed to red cedar dust. The doctor's testimony establishes that the Claimant cannot return to work for Creative Forest Products or any other employment where he is exposed to red cedar dust.

VII

Dr. Torrington's testimony establishes that the allergy and asthma the Claimant developed while employed by Creative Forest Products is a disease. The doctor's testimony also established that, inasmuch as the Claimant's allergy developed over a period of months, the disease process was non-acute.

VIII

During the time that the Claimant was employed there, Creative Forest Products was insured for its liability under the Idaho Workmen's Compensation Law under a policy of insurance issued by the surety, Maryland Casualty Company.

CONCLUSIONS OF LAW

I

IDAHO CODE, Section 72-437 states the following:

> "OCCUPATIONAL DISEASES--RIGHT TO COMPENSATION. When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the employed within the period previous to his disablement as hereinafter limited, the employee, or, in the case of

his death, his dependents shall be entitled to compensation."

IDAHO CODE, Section 72-102(17), contains the following definitions:

"(a) 'Occupational disease' means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment.
(b) 'Contracted' and 'incurred,' when referring to an occupational disease, shall be deemed the equivalent of the term 'arising out of and in the course of' employment.
(c) 'Disablement'. . . means the event of an employee's becoming actually and totally incapacitated because of an occupation in which injuriously exposed to the hazards of such disease, and 'disability' means the state of being so incapacitated."

II

In this case, the Claimant developed an allergy and asthma as a result of his

exposure to red cedar dust while working for Creative Forest Products. Because the Claimant can no longer be exposed to red cedar dust, he is disabled from work in his last occupation. However, the Defendants argue that he is not entitled to compensation based upon IDAHO CODE, Section 72-439, which states in part:

> "An employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer."

III

The Defendant's argument is well taken. The Claimant in this case worked only 48 shifts. Some of those shifts began on one day and ended the next day. The Referee does not believe that the

legislature intended to treat work from 8:00 p.m. to 4:00 a.m. as work on two days while work from 8:00 a.m. to 4:00 p.m. is work on one day. Therefore, for the purpose of Section 72-439, the Claimant has worked 48 days.

IV

The Claimant argues that he was exposed to red cedar dust on days when he went to the plant and found that there was no work. There was no requirement that the Claimant report to work on those days. Thus, those exposures did not occur in the course of the Claimant's employment. The Referee notes that the portion of Section 72-439 quoted above does not specifically require that the sixty days of exposure be in the course

of the Claimant's employment. However, considering Section 72-439 and the occupational disease law as a whole, the Referee is convinced that the legislature intended that the sixty days of exposure be in the course of the Claimant's employment. Thus, the Claimant has not established that he was exposed to red cedar dust in the course of his employment on sixty days as required by IDAHO CODE, Section 72-439.

V

The Claimant argues that the sixty-day exposure requirement in Section 72-439 is unconstitutional; he argues that the requirement violates the Due Process and Equal Protection clauses of the United States Constitution and the Idaho

Constitution. However, it is clear that the Commission does not have the authority to rule on the constitutionality of a section of the Workmen's Compensation Law. Wanke vs. Ziebarth Construction Company, 69 Idaho 64, 202 P.2d 384 (1948). Therefore, because the Claimant has not met the sixty-day exposure requirement of IDAHO CODE, Section 72-439, he is not entitled to compensation for his allergy and asthma.

VI

The Industrial Special Indemnity Fund is a party to this matter because the Claimant alleges that he is totally and permanently disabled as a result of the combined effects of his allergy to red cedar dust and impairments which

preexisted his employment at Creative Forest Products. See IDAHO CODE, Section 72-332. The Claimant presented the testimony of a rehabilitation consultant who testified that the Claimant is totally disabled. While the Referee has serious reservations about her testimony, it is not necessary to resolve that issue inasmuch as the Claimant has failed to establish that he contracted a compensable occupational disease. Thus, the Claimant is not entitled to receive any benefits from the Industrial Special Indemnity Fund.

O R D E R

IT IS HEREBY ORDERED, ADJUDGED, and DECREED, and this does order, adjudge, and decree, that the Claimant, Edwin

Dalton, has not established that he contracted a compensable occupational disease and his Application for Hearing against the Defendants, Creative Forest Products, Maryland Casualty Company, and the State of Idaho Industrial Special Indemnity Fund, is hereby DISMISSED.

Randall Paddock,
Referee

O R D E R

The Commission has reviewed the record and the foregoing Findings of Fact, Conclusions of Law and Order, and hereby approves and confirms the same, and adopts them as the Decision and Order of the Commission. The Decision is ordered filed by the Secretary of the Commission.

DATED and FILED this 26 day of January, 1984.

INDUSTRIAL COMMISSION

/s/ WILL S. DEFENBACH
Will S. Defenbach, Chairman

/s/ GERALD A. GEDDES
Gerald A. Geddes, Member

/s/ L. G. SIRHALL
L. G. Sirhall, Member

ATTEST:

a/s Patricia S. Ramey
Patricia S. Ramey,
Secretary

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

GEORGE A. BINT, Claimant-Appellant, vs. CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety, Defendants-Appellants.	Supreme Court Nos. 15192 and 15392 NOTICE OF APPEAL Filed May 7, 1985
EDWIN W. DALTON, Claimant-Appellant, vs.	

NOTICE OF APPEAL

CREATIVE FOREST PRODUCTS, Employer and MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND.	)
Defendants-Respondents.	)

COME NOW George A. Bint, and Edwin W. Dalton, and hereby appeal to the Supreme Court of the United States from the decisions of the Idaho Supreme Court dated January 29, 1985 and April 11, 1985 in the above-entitled matter. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Since this appeal involves a constitutional challenge to Idaho Code §72-439, 28 U.S.C. §2403(b) may be applicable.

NOTICE OF APPEAL

DATED This 3 day of May, 1985.

GOICOECHEA LAW OFFICE,
CHARTERED

By: /s/ LYNN M. LUKER
Lynn M. Luker

CERTIFICATE OF SERVICE

STATE OF IDAHO)
: ss.
County of Ada)

I, LYNN M. LUKER, a member of the bar of the United States Supreme Court, hereby certify that a copy of the foregoing NOTICE OF APPEAL was served on the following people by depositing it in the United States Mail, with first class postage prepaid on the 3rd day of May, 1985:

John W. Barrett, Esq.
Michael G. McPeek, Esq.
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& BLANTON
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Boise, Idaho 83701

Attorneys for Creative Forest Products and Maryland Casualty Company

and

NOTICE OF APPEAL

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and

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Boise, Idaho 83720

and

NOTICE OF APPEAL

State of Idaho
Industrial Commission
317 Main Street
Boise, Idaho 83720

/s/ LYNN M. LUKER
LYNN M. LUKER

STATE OF IDAHO)
: ss.
County of Ada)

On this 3rd day of May, 1985, before me, a Notary Public for the State of Idaho, personally appeared LYNN M. LUKER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

/s/ PATRICIA SMITH
Notary Public for Idaho
Residing at Boise

NOTICE OF APPEAL

85-110

Office-Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS,
CLERK

Supreme Court No. _____

In the Supreme Court of the United States
OCTOBER TERM, 1985

George A. Bint,
Appellant,
v.
Creative Forest Products, Employer, and
Maryland Casualty Company, Surety,
Appellees

Edwin W. Dalton,
Appellant,
v.
Creative Forest Products, Employer,
Maryland Casualty Company, Surety, and
State of Idaho, Industrial Special Indemnity Fund,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

Appellees' Motion to Dismiss on the Grounds That Appellants Have Not Raised A Substantial Federal Question

John W. Barrett
Donald D. Saint-Just
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I.

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II.

QUESTIONS PRESENTED BY APPELLANTS AND SUMMARY OF ARGUMENT THAT SUCH QUESTIONS DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

Appellants have set forth their questions on appeal as follows:

> 1. Does the sixty (60) day exposure requirement for nonacute occupational diseases under Idaho Code Section 72-439 create unreasonable classifications which violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
>
> 2. Does the sixty (60) day exposure requirement for occupational diseases under Idaho Code Section 72-439 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing an irrebuttable presumption?

Appellees respectfully submit that neither question raised by appellants presents a substantial federal question.

As to the first question raised by appellants, this Honorable Court has determined that the applicable standard of review with regard to social and economic legislation is that of the rational basis test. The Idaho Supreme Court employed such a test in examining Idaho Code Section 72-439, and found that the legislature had several reasonable bases for the legislation, and that therefore there was no violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Because the rational basis test is the appropriate test for such legislation and because, as the Idaho Supreme Court found, there were reasonable grounds for the legislation, appellants have raised in their first question no substantial federal question.

As to the second question raised by appellants regarding an alleged "irrebuttable presumption," the legislation-in-question does not in fact contain an "irrebuttable presumption," and appellants' question has no foundation. But assuming only for the sake of argument that the Honorable Court should somehow find the statute contains an irrebuttable presumption, the Court has held in social welfare cases such as the one at bar that it would apply the rational basis test in analyzing the classification created by the presumption. As noted previously, the Idaho Supreme Court applied the rational basis test to the legislation and found several rational bases for the legislation, as shall be discussed in greater detail subsequently. Thus, appellants' second question raises no substantial federal question.

III.

PARTIES

All the parties to this proceeding are listed in the caption of this case.

IV.

OFFICIAL REPORTS AND OPINIONS

As of the writing of this brief, the decisions by the Idaho Supreme Court in these cases have not appeared in the official reports. Copies of these slip opi-

nions of the Idaho Supreme Court dated January 29, 1985, and April 11, 1985, are attached in the Appendix to Appellants' Jurisdictional Statement.

V.

RELEVANT STATUTE

The pertinent provision of Section 72-439 of the Idaho Code challenged by appellants is as follows:

> An employer shall not be liable for any compensation for a non-acute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.

VI.

STATEMENT OF THE CASE

Appellants George Bint and Edwin Dalton were exposed to red cedar dust while working at a facility of Creative Forest Products. Both men complained of developing an occupational disease as a result of exposure to the red cedar dust. Both men brought workmen's compensation claims before the Industrial Commission of the State of Idaho. The Industrial Commission determined that the occupational diseases of appellants were "nonacute" based upon the testimony of Dr. Torrington, a medical expert, whose testimony was unrefuted by any evidence. The Commission found that appellants had been exposed to red cedar dust less than sixty (60) days. Because appellants had not met the 60-day exposure requirement of Idaho Code Section 72-439 for *non*acute occupa-

tional diseases, the Industrial Commission denied the claims of appellants.[1]

Appellants appealed the decision of the Industrial Commission to the Idaho Supreme Court where the Idaho Supreme Court found that Idaho Code Section 72-439 did not violate state or federal constitutional provisions concerning equal protection and due process. The Idaho Supreme Court applied the rational basis test to determine the validity of the statute, and it found several rational reasons for the legislation.

On page 17 of their brief, appellants incorrectly assert that the Idaho Supreme Court "made very little effort to come up with any rational basis to support" the statute and that "no legitimate reason was ever pointed out." Contrary to appellants' contentions, the Idaho Supreme Court did point out significant and legitimate reasons for the legislation. The Idaho Supreme Court stated that the "legislature has legitimate interest in seeing that coverage for occupational diseases be kept within reasonable limits and in controlling the financial impact on Idaho industry and consumers." Another reason specified by the Court was that it "would be unfair to impose liability on

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[1]Appellants argued before the Industrial Commission that Idaho Code Section 72-439 was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Although appellants claim in their brief before this Court that the Industrial Commission declined to rule on those issues, it should be noted that the Commission was precluded from ruling on issues of constitutionality. *Brock* v. *Boise*, 95 Idaho 630, 516 P.2d 189 (1973); *Wanke* v. *Ziebarth*, 69 Idaho 64, 202 P.2d 384 (1949).

employers for time-related diseases without imposing a corresponding time requirement on the employment relationship." The Court further noted that occupational disease compensation generally has lagged behind accident compensation and that there was the "fear that the heavy incidence of occupational disease would place an unbearable burden on the compensation system." Another legislative concern mentioned by the Court was whether "a problem as generalized and as extensive as occupational disease could be effectively dealt with under workmen's compensation." The Idaho Supreme Court upheld the validity of Idaho Code Section 72-439 since the statute reflected "a reasonable conceivable, legitimate public purpose."

VII.

REASONS FOR DISMISSING APPELLANTS' APPEAL ON THE GROUND THAT APPELLANTS HAVE NOT RAISED A SUBSTANTIAL FEDERAL QUESTION

A. The 60-day Exposure Requirement of Idaho Code Section 72-439 Does Not Create An Unreasonable Classification Violative of the Equal Protection Clause of the Fourteenth Amendment.

Appellants have attacked Idaho Code Section 72-439 as an unreasonable classification which violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appellants claim the classification creates two classes of persons — a class of persons developing a *non*acute disease when exposed to a hazard for a period of 60

days or more and a class of persons developing a nonacute disease when exposed to a hazard for less than 60 days. Appellants argue that such classifications are unreasonable and arbitrary and violate the Equal Protection Clause. But appellants have raised no substantial federal question as the Idaho Supreme Court used the proper analysis mandated by this Court, and under such analysis the Idaho Court found the statute-in-question constitutional as there were rational bases for its existence.

The United States Supreme Court has consistently held with respect to social welfare programs, such as workmen's compensation,[2] that so long as the line drawn by the State is rationally supportable, the court will not impose its judgment. *Geduldig* v. *Aiello,* 417 U.S. 484, 495 (1974); *Schweiker* v. *Wilson,* 450 U.S. 221, 234 (1981). In *Schweiker* v. *Wilson, supra,* an issue arose as to whether Congress could decline to grant supplementary security income benefits to a class of otherwise eligible individuals who were excluded because they were institutionalized in public mental institutions that did not receive Medicaid funds for their care. 450 U.S. at 222. Citing *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911), the Court employed the rational basis test which would allow for inequities so long as there was some rational basis for the legislation:

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[2]Workmen's compensation laws are social welfare legislation. *See* Larson, *The Law of Workmen's Compensation* §§ 1-5, 96 (1982); *Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 238-39 (1917).

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause (and correspondingly the federal government does not violate the Equal Protection component of the Fifth Amendment) merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequity."

450 U.S. at 234. The Court noted that Congress had the rational basis of economic pragmatics for determining to cover some situations and not others. Commenting that government programs were of a limited nature, the Court noted:

> This inquiry (reasonable basis) employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

450 U.S. at 234, *quoting Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976). The Court stated that courts should grant a strong presumption of constitutionality to legislation conferring monetary benefits because a legislative body should have discretion in deciding how to "expend necessarily limited resources" and because "(a)warding this type of benefits inevitably involves the kind of line drawing that will leave some comparably needy

person outside the favored circle." 450 U.S. at 238. Thus, in *Schweiker* v. *Wilson*, this Honorable Court recognized, as did the Idaho Supreme Court in the cases at bar, that the allocation of limited funds in a state social welfare program is a legitimate and rational basis for line-drawing in legislation so as not to provide benefits to persons in certain situations.[3]

An analogous case to the cases at bar is that of *Geduldig* v. *Aiello, supra*, which involved the California disability insurance system under which employees contributed to the unemployment compensation disability fund. Under the California law, cer-

[3]In *Idaho Department of Employment* v. *Smith*, 434 U.S. 100 (1977), this Court recognized that a state has a legitimate right to define the parameters of its limited resources and held that an Idaho statute providing that "no person shall be deemed to be unemployed while attending a regularly established school excluding night school" did not violate the Equal Protection Clause by denying unemployment benefits to otherwise eligible persons who attend school during the day. The Court held that it was rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and consequently that attending school in the daytime imposes a greater restriction upon obtaining full time employment than does attending night school. The Court recognized that a state may place such restrictions on economic benefits in light of its limited economic resources. Stated the Court:

> In a world of limited resources, a state may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school . . . The fact that the classification is imperfect and that the availability of some students desiring full time employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited *supra* render the statute invalid under the United States Constitution. [434 U.S. at 101-02.]

tain disabilities were not compensable. For example, disabilities lasting less than eight days were not compensable. Disabilities attributable to pregnancy were not compensable. In *Geduldig,* this Court applied the rational basis test and determined that the statute did not constitute an invidious discrimination violative of the Equal Protection Clause. The Court held that the program did not discriminate with respect to persons or groups eligible for its protection in that there was no evidence that it discriminated against any definable group or class. In *Geduldig,* the Court held that the mere fact that California chose not to cover certain risks was not a violation of the Equal Protection Clause. Stated the Court:

> The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the state has selected to insure. Although California has created a program to insure most risks of employment disability, it has chosen not to insure all such risks, and this decision is reflected in the level of annual contributions exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a state "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others . . ."

417 U.S. at 495, *quoting Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). This Court went on to note that it would not determine where a state legislature should draw the lines with regard to its

spending on social welfare:

> Particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that the state must choose between attacking every aspect of a problem or not attacking the problem at all."

417 U.S. at 484, *quoting Dandridge* v. *Williams,* 397 U.S. 471, 486-87 (1970). The Court in *Geduldig* recognized that covering all risks in a disability insurance system might be financially burdensome for a state and that comprehensive coverage under a state system was not constitutionally mandated.[4] *Geduldig* is analogous to the case at bar. In *Geduldig,* the state of California disability insurance system had provisions excluding coverage for disability lasting less than eight days and provisions excluding coverage for pregnancy. In Idaho, the legislature has determined

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[4]The Court recognized that a legislature's concern for its own limited resources could take precedence over its interest in a comprehensive social insurance program:

> It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the state to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.
>
> The state has a legitimate interest in maintaining the self-supporting nature of its insurance program. [417 U.S. at 495-96.]

that only persons suffering *non*acute occupational diseases who are exposed to a hazard for a period of more than 60 days will be covered. In *Geduldig* and the cases at bar, the state legislatures determined that all possible disabilities or occupational diseases would not be covered. In both, the courts recognized the legislatures had legitimate interests in protecting limited economic resources and in determining what social welfare matters would be covered. As noted by the Court in *Geduldig,* the mere fact that a person suffers a personal disability which is not covered by the state's plan is not sufficient to make a proper claim for denial of the Equal Protection Clause of the Fourteenth Amendment.[5]

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[5]417 U.S. at 497. The mere fact that a person is not covered under a social welfare plan does not create a constitutional issue under the Equal Protection Clause worthy of being heard by this Honorable Court. In *Geduldig,* this Court stated with regard to the claimant:

> The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment. [*Id.*]

Similarly, in *Cleland* v. *National College of Business,* 435 U.S. 213 (1978), this Court held constitutional provisions of the GI Bill not allowing veteran educational assistance benefits if the veteran enrolled in a course in which more than 85 percent of the students were receiving financial assistance. The Court held that Congress had a rational basis to conclude that established courses with a substantial enrollment of nonsubsidized students were more likely to be quality courses. The Court in *Cleland* recognized that the statute would act to deprive some veterans of any access to education, but that such was not a violation of the

In addition to other legitimate state interests, the Court in *Weinberger* commented that the state has a legitimate interest in setting up prophylactic measures such as time requirements to make administrative determinations easier and more certain.[6]

Equal Protection Clause:

> Appellee contends that the challenged restrictions will completely deprive some veterans — those who live in areas where there are no programs which satisfy the two requirements — of veterans' educational assistance. While the restrictions on their face simply channel veterans toward courses which Congress has determined are more likely to be worthwhile, they may in fact operate to make benefits functionally unavailable to some veterans not living in close proximity to schools offering qualified programs and unwilling or unable to move to take advantage of the federal assistance. Nevertheless, the fact that Congress' judgment may deprive some veterans of the opportunity to take full advantage of the benefits made available to veterans by Congress is not a sufficient basis for greater judicial oversight of that judgment. [435 U.S. at 221 n.9.]

[6]In *Weinberger,* this Court noted that time period requirements in the area of social welfare benefits can serve a number of purposes:

> While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think that it is clear that Congress could rationally choose to adopt such a course. Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees represent, but also claimants in other programs for which the Social Security Act imposes duration of relationship requirements. Not only does the prophylactic approach thus obviate the necessity for large number of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from

Thus, *Weinberger* stands for the proposition that statutory time periods which must be met in order for there to be coverage for certain social welfare benefits are not in and of themselves violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As the Court noted in *Weinberger,* a legislature may use time limitation periods for a number of reasons, including the reason that such limitations make administrative determinations easier and more certain. In the case at bar, the 60-day statutory period eases the administrative burden of determining whether the nonacute occupational disease was primarily related to the employment of the particular employer.

Appellants appear to argue in their brief that if a state chooses to provide some social welfare benefits, it must cover all situations. But this Court has repeatedly rejected such contentions. In *Jefferson* v. *Hackney,* 406 U.S. 535 (1972), recipients of Aid to Families with Dependent Children (AFDC) challenged the Texas welfare system whereby Texas applied a percentage reduction factor to arrive at a reduced standard of need. AFDC argued that since the factor was lower for AFDC than for other categorical assistance programs, the system violated the Equal Protection Clause. In holding that this system did not

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the uncertainties and delays of administrative inquiry into the circumstances of their marriages. Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown by appellees to be reliably determinable. [422 U.S. at 781-82.]

violate the Equal Protection Clause of the Fourteenth Amendment, this Court noted:

> A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving it.

406 U.S. at 546-47.

As long as there is some rational basis for a state dispensing its funds on some social welfare concerns, but not others, the Court will not second guess the legislature.[7] In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the AFDC in another situation brought suit to enjoin the application of Maryland's maximum grant regulation as contravening the Equal Protection Clause of the Fourteenth Amendment. In *Dandridge,* the Court found that although the statute treated families differently, the state had great latitude in

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[7]This Court on numerous occasions has expressed its reluctance to consider the wisdom of legislation on social welfare issues. For example, in *Richardson* v. *Belcher,* 404 U.S. 78 (1971), the Court upheld Section 224 of the Social Security Act which required a reduction in Social Security benefits to reflect workmen's compensation payments. The Court held that such a statutory provision did not violate the Equal Protection Clause of the United States Constitution. The Court in that case noted that Congress did have a rational basis for its legislation and that the Court would not substitute its judgment for Congress:

> We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary to violate the due process clause of the Fifth Amendment. [404 U.S. at 84.]

Although there are few decisions by this Honorable Court applying the Equal Protection Clause to workmen's compensation laws, the Court has held it proper for a state legislature to cover certain risks and occupations but not others, under its workmen's compensation laws, and that such determinations are best left to the legislature. In *Lower Vein Co.* v. *Industrial Board*, 225 U.S. 144 (1921), an issue arose as to whether the Indiana legislature could compel coal companies to operate under the Employers Liability Act while leaving compliance as to other employers on a permissive basis. In finding such a law to be within the power of the legislature and not violative of the Equal Protection Clause, the Court commented that both the Employers Liability Act and the Workmen's Compensation Act differed in manner and effect, but that the legislature could exercise its judgment of what was necessary for the public welfare. This Court commented that the decision of the state legislature could not be pronounced arbitrary simply because it could be disputed and "opposed by argument in an opinion of serious strength." 255 U.S. at 151. Similarly, in *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152 (1918), the Texas Workmen's Compensation Act provided that an employer could come under the workmen's compensation act if it so decided. The act excluded certain laborers from its provisions. Stated the United States Supreme Court:

> There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The Equal Protection Clause does not require that state law shall cover the entire field of proper legislation in a single enactment. If one entertained the view

dispensing its available funds. This Court noted that it did not wish to intrude upon the decision of the legislature on matters of social and economic concern where there was a rational basis for the state's action:

> It is enough that the state's action be rationally based and free from invidious discrimination. The regulation before us meets that test.
>
> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly, ante,* p. 254. But the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

397 U.S. at 487. As the foregoing discussion has indicated, this Court has applied the rational basis test to social welfare legislation such as Idaho Code Section 72-439. This test was employed by the Idaho Supreme Court which determined that the Idaho

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that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. [249 U.S. at 157-58.]

legislature had rational bases for its passage of the statute, one of which alone was sufficient, namely the legislature's concern for the allocation of the financial resources of its workmen's compensation system such that recovery for nonacute occupational diseases be kept within reasonable limits. In the case at bar, the Idaho Supreme Court noted the legislature's fear that covering all nonacute disease situations would result in an unbearable burden being placed on the compensation system, and that it would be unfair to impose on employers liability for time-related diseases without imposing a time requirement on the employer-and-employee relationship. This Court also made reference to the concern that a problem as generalized and extensive as that of occupational disease could not be effectively dealt with under workmen's compensation. Other rational reasons for the Idaho legislature's passage of the statute-in-question, not mentioned by the Idaho Supreme Court, relate to easing administrative decisions, weeding out false claims, and reducing uncertainty with regard to legitimate claims.[8] See *Weinberger* v. *Salfi, supra.*

Because there are numerous rational reasons for the Idaho legislature's passage of Idaho Code Section 72-439 and because of this Court's reluctance to second guess a legislature in a social welfare policy deci-

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[8]Although such reasons were not mentioned by the Idaho Supreme Court, this Court has held that the fact that a statute discriminates in favor of a certain class does not make it arbitrary if any state of facts reasonably can be conceived to sustain it. *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527 (1931); *Asbury Hospital* v. *Cass County,* 326 U.S. 207 (1945).

sion of this nature, it is respectfully submitted that appellants have presented no substantial federal question.

B. The 60-Day Exposure Requirement of Idaho Code Section 72-439 Does Not Create an Irrebuttable Presumption, But Even If It Did, the Statute Would Not Violate the Due Process Clause

Appellants have challenged the 60-day exposure requirement of Idaho Code Section 72-439 as being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing an irrebuttable presumption.

The 60-day exposure requirement of the statute-in-question references no presumption, nor was it intended to create any presumption. Rather, the 60-day exposure requirement under Idaho Code Section 72-439 is simply a minimum time requirement the Idaho legislature has set as being necessary for the award of benefits for *non*acute occupational diseases under Idaho's workmen's compensation laws. Many statutes have a time requirement that must be met in order for benefits to be obtained, but such a requirement in itself does not create an irrebuttable presumption. The 60-day exposure rule reflects a policy determination by the Idaho legislature that benefits will not be awarded in *non*acute occupational disease cases unless the employee has been exposed to the hazard of the disease for 60 days. The time limitation in Idaho Code Section 72-439 is certainly a limitation, but it

has nothing to do with, nor does it create, an irrebuttable presumption.

But even if, for the sake of argument, Idaho Code Section 72-439 should be construed to create an "irrebuttable presumption," the statute would nonetheless not violate the Due Process Clause of the Fourteenth Amendment.

In *Weinberger* v. *Salfi, supra,* it will be recalled that provisions of the Social Security Act set forth a nine-month duration of marriage requirement as a precondition for survivor's benefits. In *Weinberger,* a widow challenged this requirement as being an irrebuttable presumption violative of the Equal Protection Clause of the Fourteenth Amendment. This Honorable Court held that the irrebuttable presumption did not violate the Equal Protection Clause. This Court distinguished its earlier decisions cited by the claimant involving irrebuttable presumptions by noting that such decisions involved issues of fundamental rights requiring a stricter type of scrutiny. In *Weinberger,* this Court noted it was not faced with a case where a fundamental right was involved, but rather it was faced with examining social welfare legislation. In *Weinberger,* the Court held that the proper standard for reviewing classifications in social welfare legislation under the Due Process Clause is the same standard to be used in examining the validity of social welfare legislation under the Equal Protection Clause. Accordingly, the Court employed the rational basis test in *Weinberger* v. *Salfi.* In refusing to apply anything more than the rational basis test to the case involving Social Securi-

ty benefits, the Court noted that to do otherwise would be to destroy countless legislative judgments in social welfare situations:

> We think that the district court's extension of the holdings of *Stanley, Vlandis* and *LaFleur* to the eligibility requirement at issue would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which heretofore have been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution. For example, the very section of Title 42 which authorizes an action such as this, Section 45(g), requires that a claim be filed within 60 days after administrative remedies are exhausted. It is undisputable that this requirement places people who file their claims more than 60 days after exhaustion in a different "class" from people who file their claims within the time limit. If we were to follow the district court's analysis, we would first try to ascertain the Congressional "purpose" behind the provision, and probably would conclude that it was to prevent stale claims from being asserted in court. We would then turn to the questions of whether such a flat cut off provision was necessary to protect the secretary from stale claims, whether it would be possible to make individualized determinations as to any prejudice suffered by the secretary as a result of an untimely filing, and whether or not an individualized hearing on that issue should be required in each case. This would represent a degree of judicial involvement in a legislative function which we have eschewed except in the most unusual circumstances and which is quite unlike the judicial

> role mandated by *Dandridge, Belcher,* and *Nestor,* as well as by a host of cases arising from the legislative efforts to regulate private business enterprises.

422 U.S. at 772-73.

As noted in a previous section of this brief, the Idaho Supreme Court applied the rational basis test —the proper analysis — to Idaho Code Section 72-439 and determined that there were several rational reasons for the legislature adopting the 60-day exposure requirement of that statute. Appellants have presented this Court with no substantial federal question to merit review by this Court.

VIII.

CONCLUSION

Appellants have presented no substantial federal question worthy of consideration by this Honorable Court. The appellants have challenged Idaho Code Section 72-439 as being violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Idaho Supreme Court in examining the constitutionality of that statute employed the rational basis test to determine its validity. The United States Supreme Court has held on numerous occasions that the rational basis test is the appropriate standard for review for social welfare legislation. Although appellants claim there was no rational basis mentioned by the Idaho

Supreme Court for the legislation, the Idaho Supreme Court did in fact list several rational reasons for the legislature enacting Idaho Code Section 72-439. Appellants have raised no substantial federal question with regard to their first question.

As to appellants' second question relating to the alleged irrebuttable presumption, Idaho Code Section 72-439 creates no irrebuttable presumption. That section merely creates a time period which must be met before benefits will be paid. But even if the statute should somehow be construed to create an irrebuttable presumption, the statute would still be constitutional. As this Court has held in *Weinberger* v. *Salfi*, *supra*, in areas of social and economic welfare, the Court will apply the rational basis test to determine the validity of the legislation under the Due Process or Equal Protection clauses of the Constitution. The Idaho Supreme Court applied the rational basis test and found several rational bases for the Idaho Legislature's passage of Idaho Code Section 72-439. Appellants have raised no substantial federal question with regard to their second question.

Appellees respectfully request that Appellants' appeal be dismissed as they have raised no substantial federal question.

DATED this 24th day of July, 1985.

RESPECTFULLY SUBMITTED,

/s/

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/s/

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STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, DONALD D. SAINT-JUST, a member of the bar of the United States Supreme Court, hereby certify that a copy of the foregoing APPELLEES' MOTION TO DISMISS ON THE GROUNDS THAT APPELLANTS HAVE NOT RAISED A SUBSTANTIAL FEDERAL QUESTION was served on the following people by depositing it in the United States Mail, with first class postage prepaid, on the 24th day of July, 1985:

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Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT NO. 85-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GEORGE A. BINT,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety,

Defendants-Respondents.

EDWIN W. DALTON,

Claimant-Appellant,

v.

CREATIVE FOREST PRODUCTS, Employer, MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants-Respondents.

APPELLANTS' REPLY TO APPELLEES'

MOTION TO DISMISS

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SUPREME COURT NO. 85-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GEORGE A. BINT,	)
	)
Claimant-Appellant,	)
	)
v.	)
	)
CREATIVE FOREST PRODUCTS, Employer, and MARYLAND CASUALTY COMPANY, Surety,	)
	)
Defendants-Respondents.	)
	)
EDWIN W. DALTON,	)
	)
Claimant-Appellant,	)
	)
v.	)
	)
CREATIVE FOREST PRODUCTS, Employer, MARYLAND CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,	)
	)
Defendants-Respondents.	)

APPELLANTS' REPLY TO APPELLEES'

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ARGUMENT

Appellees Creative Forest Products and Maryland Casualty Company have filed a Motion to Dismiss on the grounds that Appellants have not raised a substantial Federal question. The substance of Appellees' argument is that they believe the Idaho Statute in question, Idaho Code §72-439, is constitutionally sound, and meets the "rational basis" test. Appellees' argument is basically an argument on the merits of the claim, rather than jurisdiction, and Appellants would therefore argue that the Motion is not well-founded.

Nevertheless, Appellants would make a few comments concerning the arguments asserted by Appellees. The focus of their argument is found on page 6 of Appellees' Brief, wherein it is stated:

> But Appellants have raised no substantial Federal question as the Idaho Supreme Court used the proper analysis mandated by this Court, and under such analysis, the Idaho Court found the statute-in-question constitutional as there were rational bases for its existence.

It appears that their argument is that any time an appellate court reviews equal protection or due process questions, and in name identifies the appropriate test, i.e., in this case, the rational basis test, and then sets forth some reasons why it believes a statute is constitutional, there is no federal question. That concept was clearly rejected in Zoebel v. Williams, 457 U.S. 55 (1982). In Zoebel, the Alaska Supreme Court recognized the appropriate standard of review, i.e., the rational basis test. The Alaska Supreme Court, in upholding the Alaska statute in Zoebel proposed

three different rationalizations or reasons supporting the statute in question. However, this Honorable Court, on appeal, found that the proferred purposes justifying the classifications were not rationally related to the purposes of the statute. Thus, a simple recognition of the appropriate standard to be applied, and the offering of some proposed justification for a statute does not insulate from examination by this Honorable Court.

Ironically, the Idaho Supreme Court itself, in Jones v. State Board of Medicine, 97 Idaho 859, 870-71, 555 P.2d 399, 410-11 (1976), pointed out the dangers of a cursory review in constitutional circumstances such as this. Therein, the Idaho Court stated the following:

[We] believe that the standard to be applied in testing the classification created by the challenged legislation is one of lesser scrutiny. Appellants argue that the classification created by the legislation must be judged by the standard set forth in McGowan v. Maryland, supra, which broadly states that "a statutory discrimination will not be set aside if any state of facts may be conceived to justify it." (Emphasis supplied). See also, Evans v. Idaho State Tax Commission, 95 Idaho 54, 501 P.2d 1054 (1972). On the other hand, respondents assert that the classification created by the legislation must be testified by the standard of Reed v. Reed, supra, i.e., according to whether it "rests on some ground of difference having a fair and substantial relation to the object of the legislation." See also, Thompson v. Hagan, supra. When the test set forth in McGowan has been utilized, the result has ordinarily been the removal of the court from any but the most cursory review of the challenged legislation. It invites courts to conceive purposes which would justify statutes. The validity or invalidity of discriminatory classifications may under that test depend solely upon the extent of the imagination of the reviewing court and/or its adherence to the theory of judicial restraint. See, e.g., Goesaert v. Cleary, 335 U.S. 464,

69 S.Ct. 198, 93 L.Ed. 163 (1948); Kotch v. Board of River Port Pilots Commissioners, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 184 (1912), nevertheless, blind adherence and over-indulgence results in abdication of judicial responsibility. It is appellant's position in the case at bar that since the legislature has declared the purpose of the subject Act and since that declaration is said and presumed to be founded on a rational factually based legislative determination, this Court is foreclosed from additional inquiry into the Act. We disagree.

This Court has found it necessary to look beyond the minimal scrutiny test of McGowan in reviewing the classification alleged to be violative of equal protection. In so doing, we have relied upon the standard set forth in F. S. Royster Guano Co. v. Virginia, supra, as quoted in Reed. That test scrutinizes the means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose.

Jones v. State Board of Medicine, 97 Idaho 870-71 (Emphasis part original and part added).

Appellants would submit that the discriminatory character of the

challenged classifications in this case are facially apparent. One of the patently arbitrary features concerning the classification between "acute" and "non-acute" diseases in Idaho Code §72-432 is a clear lack of any definition of those terms. The arbitrary nature and effect of this lack of definition is emphasized by the concurring opinion of Justice Bakes in the Idaho Supreme Court's opinion in this matter. (Appellants' Jurisdictional Statement, P. A-26). He suggests that there could be some other facts that could be developed to show that the cedar dust disease was "acute", thereby qualifying Mr. Bint and Dalton or for coverage. Thus, Justice Bakes would have the claimant go out and find another doctor who would say that the onset of these particular symptoms

were acute. Clearly, the terms "acute" and "non-acute" are relative, and, when undefined in the statute as presented in this case, deny equal protection.

Much more can be said concerning the merits of this claim and the arbitrary classifications that it establishes, as well as the irrebutable presumption that it creates. However, those points are more appropriately reserved for a brief on the merits. In closing, however, Appellants would simply like to point out a hypothetical situation, which illustrates the arbitrary and unreasonable nature of this 60 day exposure restriction.

Assume that there are three workmen in the same employment who are hired at the same time. All three began having respiratory problems over a period

of three weeks, and on the 55th day, they all three decide to see their respective family physicians. Worker A gets an appointment within three working days. Worker B gets an appointment within three working days. Worker C gets an appointment within seven working days. Worker A goes to his doctor and is diagnosed as having an occupational disease caused by his immediate employment. The physician later opines that the disease is non-acute because it came on over a three week period. Worker A's physician tells him not to return to work, and A quits on the 59th day.

Worker B sees his physician, and is told that he has the same occupational disease, but his physician later feels that it can be classified as an acute disease, in that he thinks that a three

week onset of this type of disease is rather quick. Worker B's physician tells him that he should not go back to work and Worker B quits on the 59th day.

Worker C's doctor also believes that Worker C has the same occupational disease, and tells him to quit work. Worker C quits on the 63rd day. His doctor isn't quite sure whether the disease is acute or non-acute, and doesn't feel like he can express an opinion.

Under this scenario, all three workers are situated the same situation as far as the disease is concerned. However, Worker A loses out because he has a non-acute disease and was not exposed for 59 days. Worker B is covered because, although he worked less than 60 days, his disease was acute. Worker C

also gets benefits, and while he has the same disease as Worker A, it doesn't really matter whether his disease is acute or non-acute, because he worked 60 days, and he gets benefits. Such a result is neither reasonable nor rational, and the circumstances of these particular consolidated cases clearly point this out.

In Eisenstadt v. Baird, 405 U.S. 438, 447 (1972), this Honorable Court stated:

> The equal protection clause of that amendment [Fourteenth Amendment] does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Appellants believe that a substantial federal question has been presented to this Honorable Court, and would request that the matter be heard.

Respectfully submitted this 26th day of August, 1985.

GOICOECHEA LAW OFFICE,
CHARTERED

By: /s/
Lynn M. Luker

CERTIFICATE OF SERVICE

STATE OF IDAHO)
: ss.
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I, LYNN M. LUKER, a member of the bar of the United States Supreme Court, hereby certify that a copy of the foregoing APPELLANTS' REPLY BRIEF TO APPELLEES' MOTION TO DISMISS was served on the following people by depositing it in the United States Mail, with first class postage prepaid on the 26th day of August, 1985:

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On this 16th day of August, 1985, before me, a Notary Public for the State of Idaho, personally appeared LYNN M. LUKER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

/s/
Notary Public for Idaho
Residing at Boise
My Commission Expires:

Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-110

In The
Supreme Court of the United States
October Term, 1985

GEORGE A BINT,

Appellant,

v.

CREATIVE FOREST PRODUCTS, EMPLOYER, AND MARYLAND CASUALTY COMPANY, SURETY,

Appellees.

EDWIN W. DALTON,

Appellant,

v.

CREATIVE FOREST PRODUCTS, EMPLOYER, MARYLAND CASUALTY COMPANY, SURETY, AND STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

SUPPLEMENTAL MOTION TO DISMISS

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QUESTIONS PRESENTED BY APPELLANTS AND SUMMARY OF ARGUMENTS THAT SUCH QUESTIONS DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS

APPELLANTS have set forth their questions on appeal, as follows:

> 1. Does the sixty (60) day exposure requirement for nonacute occupational diseases under Idaho Code Section 72-439 create unreasonable classifications which violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
>
> 2. Does the sixty (60) day exposure requirement for occupational diseases under Idaho Code Section 72-439 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing an irrebuttable presumption?

Appellee respectfully submits that neither issue set forth by appellants presents itself as a substantial federal question.

PARTIES

All the parties to this proceeding are listed in the caption of this case.

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I.

OFFICIAL REPORTS AND OPINIONS

Inasmuch as the Idaho Supreme Court's decisions have not been published in the official reports, copies of the slip opinions in these cases dated January 29, 1985, and April 11, 1985, are attached in the Appendix to Appellants' Jurisdictional Statement.

———o———

II.

RELEVANT STATUTE

Appellants challenge Idaho Code Section 72-439 in part, as follows:

> An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.

———o———

III.

STATEMENT OF THE CASE

Appellee, State of Idaho, Industrial Special Indemnity Fund (hereinafter, Fund) specifically incorporates by reference the Statement of the Case as set forth in the *Motion to Dismiss* submitted by Appellees, Creative Forest Products and Maryland Casualty Company, dated July 25, 1985.

IV.

REASONS FOR DISMISSING APPELLANTS' APPEAL ON THE GROUND THAT APPELLANTS HAVE NOT SET FORTH A SUBSTANTIAL FEDERAL QUESTION

Appellee, Fund, believes that the *Motion to Dismiss* submitted by Appellees, Creative Forest Products and Maryland Casualty Company, has presented a correct and clear analysis of the fact and law brought forth on this appeal. Therefore, the fact and law analyzed by Appellees, Creative Forest Products and Maryland Casualty Company, in their *Motion to Dismiss* dated July 24, 1985, is hereby incorporated by reference into this *Motion to Dismiss* presented by the Fund.

V.

THE NATURE OF THE INDUSTRIAL SPECIAL INDEMNITY FUND IN IDAHO

The following overview is provided to further assist the Court in understanding the correct nature and function of the Fund. Prior to its creation, an employer who hired a handicapped worker was subject to the responsibility of paying for total permanent disability compensation to an employee who was rendered totally and permanently disabled because of a pre-existing handicap coupled with a subsequent industrial injury. See, *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921). Idaho Code Section 72-323 authorized the creation of the Fund to relieve employers of this burden. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931, 934 (1968). Thus, the ultimate goal in creating the Fund was to encourage employers to hire par-

tially incapacitated persons and to encourage partially incapacitated workers to seek employment. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696, 700 (1981); 11 W. Schneider, Workmen's Compensation § 2304 (1957).

The funds are derived from payments made by employers and their sureties. Idaho Code Section 72-323 and Section 72-327. It is administered by a manager whose office is a part of the State of Idaho, Department of Administration. Idaho Code Section 72-324. The State Treasurer is the custodian of the money received and the funds collected are placed in a designated account with payments being made in accordance with directions from the manager of the Fund. Idaho Code Sections 72-325, 72-333 and 72-326.

In addition to establishing a plan to administer the Fund, the Idaho Legislature enacted Code Section 72-332 to control the Fund's liability, which section is quoted as follows:

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of

his compensation benefits out of the industrial special indemnity account.

(2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

An explanation of Idaho Code Section 72-332 as it operates in attaching liability to an employer, surety or the Fund was advanced by the Supreme Court of Idaho in *Lyons v. Industrial Special Indemnity Fund,* 98 Idaho 403, 565 P.2d 1360, 1361 (1977), as follows:

> By virtue of Idaho Code Section 72-332 the Fund can become liable for compensation benefits whenever an employee with an existing permanent physical impairment becomes totally and permanently disabled due to an injury arising out of and in the course of his employment. The total and permanent disability must be the result either of the combined effects of the pre-existing impairment and the subsequent injury, or of the aggravation and acceleration of the pre-existing impairment by the subsequent injury. In such cases, the employer and its surety are liable for compensation benefits only for the disability caused by the subsequent and last injury. The Fund pays the remainder of the benefits to which the employee is entitled by reason of his total and permanent disability.

> If facts are established to impose liability upon the Fund, payment of workers compensation benefits are apportioned between the employer/surety and the Fund.

The above-quoted explanation of Idaho Code Section 72-332 leaves no room to doubt that the primary responsibility for payments awarded to an employee for a disability caused by a subsequent and last injury falls directly on the employer-surety and not the Fund. *Lyons,* 565 P.2d at 1361 (1977); see also, *McDonald v. Treasurer of State of Idaho,* 52 Idaho 535, 16 P.2d 988 (1932). 101 C.J.S. *Workmen's Compensation* §§ 836-848 (1958). The Fund is responsible for paying the injured workman those benefits for total permanent disability which are not required to be paid by the employer and its surety. *Carey, v. Clearwater County Road Department,* 107 Idaho 109, 686 P.2d 54 (1984).

As readily perceived by the foregoing overview, the Fund is not, and never has been a state operated entitlement program which provides to all injured employees. Rather, it operates and functions, in essence, as a reinsurer of an employer-surety to protect against a catastrophic loss precipitated by a pre-existing condition which is aggravated and accelerated by or combines with a subsequent industrial accident. The Fund was established, as promulgated by Idaho Legislators, in order to assist and encourage employers in the area of social and economic development. Therefore, whatever assistance is provided to an employee by the Fund is granted according to statutory qualifications and restrictions, which statutes are upheld and supported by the Constitution of the United States.

VI.
CONCLUSION

Respondents respectfully move that the United States Supreme Court dismiss Appellant's appeal inasmuch as no substantial federal question is at issue.

DATED This 24 day of September, 1985.

Respectfully submitted,

.....

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